No. 11707

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a corporation,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff and Appellee,

A. C. GOERIG and CLYDE PHILP, individuals and co-partners,

Defendants and Cross Appellants,

SAM MACRI, DON MACRI and JOE MACRI, individuals and co-partners.

Defendants and Cross Appellants.

BRIEF OF APPELLEE SCHAEFER

Upon Appeals from the District Court of the United States for the Eastern District of Washington, Southern Division.

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JURISDICTION

This action was brought in the Federal District Court

in the name of the United States of America for the use of M. C. Schaefer, an individual doing business as the Concrete Construction Company, as plaintiff, under and by virtue of the authority granted by Title 40, U.S.C.A., Sections 270 a and 270 b; 49 Stat. 793, 794, known as the Miller Act (Tr. 2, 10, 95, 104).

(All numerical references herein, unless otherwise indicated, are to the pages of the printed transcript of record on file herein. All italics are ours.)

This is an action by a subcontractor to recover the value of labor and materials furnished to the general contractor in the construction of a federal irrigation project, the defendants being the general contractors, their partners or joint adventurers, and their surety.

These appeals by appellant Continental Casualty Company and cross-appellants Macri, from the judgment entered against them (Tr. 112 to 115), are pursuant to Title 28, U.S.C.A., Section 225; 26 Stat. 828, as amended, and the question of the jurisdiction of this court is hereby raised with respect to the appeal of cross-appellants Macri, inasmuch as their notice of appeal was not filed within three months after the entry of judgment as prescribed by Title 28, U.S.C.A., Section 230; 26 Stat. 829, as amended. The Circuit Court of Appeals order entered herein on March 31, 1948, limits the Macri appeal to a review of the judgment pertaining to the one subcontract under specification No. 1062.

STATEMENT OF CASE

By the terms of the subcontract entered into between the defendants Macri, doing business as Macri Company, referred to hereinafter as Macri Company, and the use plaintiff, M. C. Schaefer, doing business as the Concrete Construction Company, hereinafter referred to as Schaefer, the latter agreed to furnish "all labor and necessary equipment to do all of the concrete work, form work, cut, bend and install all reinforcing steel," as shown in the plans and specifications No. 1062. It was agreed in the subcontract that all of the excavating and all of the materials necessary for the performance of the subcontract by Schaefer, were to be furnished by Macri Company, with the exception of form wire, nails and curing material. It was further agreed therein that the excavating was to be done, and the materials were to be supplied by Macri Company, in accordance with the plans and specifications and in proper time for performance of the subcontract by Schaefer (Tr. 99, 100).

About two months after this subcontract was executed, Macri Company and Schaefer entered into another subcontract requiring the same sort of work by the latter in another part of the Roza Project, covering specification No. 1068 (Tr. 105, 106). Schaefer did not commence to perform this subcontract for the reason that Macri Company failed to prepare the excavations (Tr. 107, 108). Schaefer has not attempted in this action to recover any sum whatever on account of Macri Company's breach of this subcontract as he did not furnish them any labor or materials in performance of

it. Macri Company filed a cross-complaint against Schaefer for breach of this subcontract, however, but it was dismissed by the trial court with prejudice (Tr. 111, 114), and Macri Company failed to perfect an appeal within the prescribed time. Consequently, specification No. 1068 is not involved on this appeal. Unless otherwise plainly stated, therefore, the entire discussion in this brief relates only to Schaefer's right to recover by reason of his performance with reference to specification No. 1062.

The court found that Schaefer entered into the diligent performance of the subcontract covering specification No. 1062 (Tr. 100). It is conceded by all of the parties in this case that so far as the furnishing of labor and materials is concerned, Schaefer did everything he was required to do by the subcontract. He finished all of the work specified therein and it was accepted by Macri Company and the government. It is not claimed by any one that any portion of Schaefer's work was done improperly, or that he was responsible for any delay in its completion.

On the other hand, Schaefer's claim against Macri Company, and the Continental Casualty Company as their surety, is based upon the continuing, willful failure of Macri Company to perform adequately and within a reasonable time the obligations imposed upon them by the subcontract. The claim of Schaefer with respect to the failures of Macri Company to perform their obligations will be briefly summarized.

The sides of the excavations were frequently out of line, which necessitated either further digging or cribbing and back-filling. The sides of practically all of the excavations were vertical or nearly so, and they were not excavated on a one to one slope, that is, on a forty-five degree angle, which necessitated extensive hand digging and caused Schaefer a great deal of trouble and expense. The fine grading designed to bring the bottoms of the excavations to correct levels, was occasionally too low and in nearly every other instance was too high, necessitating further hand digging which increased the work and expense to Schaefer. Other sorts of fine grading were likewise defective. Finally, the original excavating and the fine grading were so delayed as to constitute a hindrance and expense to Schaefer in that the employees of Schaefer had to do a considerable portion of the fine grading themselves in order to get the work done within any semblance of a reasonable time. With respect to lumber for forms, which Macri Company was obligated to furnish Schaefer, the quantity was insufficient, it was not furnished on time and was not of suitable quality.

The defects in the excavations as they were prepared by Macri Company will be first considered.

The sides of many excavations were out of line. Mr. Schaefer testified that when he met Sam Macri at the job site on April 29, 1944, they checked six or seven excavations and found none of them proper. He said that in some instances the excavations were not even large enough to hold the neat concrete, the concrete structure in finished form (Tr. 220). Mr. Darcy, Schae-

fer's superintendent after August 10, 1944, testified that quite a few of the excavations were off the lateral line and that the sides of some had to be cribbed and backfilled where Macri Company had over-excavated (Tr. 457).

The sides of the excavations in practically all instances were vertical, or nearly so. The specifications prepared by the Bureau of Reclamation provided that the government would pay the general contractor for the removal of common earth one foot out from the base of the concrete structure and on a slope of one to one where clearance was required in the excavations for the insertion of forms (Tr. 2208). The court declared in his opinion that the pay provisions of the specifications regarding clearance and slope were not absolute requirements, but that it was the obligation of Macri Company to do the excavating in such a way as to afford Schaefer a reasonable clearance and a reasonable opportunity to properly and efficiently carry out his part of the work. The court expressly stated in his findings of fact that where a form had to be placed between the concrete and the bank, a reasonable clearance required an excavation of one foot out from the base of the concrete structure to be built and a slope of one to one on the bank. The court said (Tr. 100, 101):

> " * * * that the excavation made by Macri & Company was not made in that manner but was made approximately one foot out from the base of the concrete structure and with practically vertical banks, and that the excavation was not done in a manner to give sufficient clearance, that is, there was not sufficient slope, there was not sufficient

width in the excavation to enable the subcontractor to efficiently and properly construct his forms and he was hindered in the progress of the work, and that the use plaintiff's carpenters installing the forms had to make extra excavation and that this was the rule rather than the exception in the progress of the work."

Mr. L. E. Bufton, an experienced engineer in concrete construction (Tr. 1135 to 1139), testified that in a proper excavation there would be a clearance of at least one foot on the outside of the finished concrete structure at the base, and a slope of one to one, to permit the insertion and removal of the forms (Tr. 1152). Mr. M. C. Schaefer, likewise, after qualifying as an expert in concrete construction (Tr. 1337 to 1340), testified that the lateral clearance reasonably required to permit the assembly of forms, was as stated by Mr. Bufton (Tr. 1340 to 1343).

In his oral opinion the court said: "The evidence is overwhelming that excavation was not made in that manner (Tr. 2210)," that is, one foot out at the base and on a slope of one to one. This statement by the court is so fully supported by the testimony that it will be unnecessary to do more than name some of the witnesses who so testified:

M. C. Schaefer, the use plaintiff (Tr. 205, 220, 231, 328)

Fred Waltie, Schaefer's first superintendent (Tr. 676, 700)

P. L. Darcy, Schaefer's superintendent after August, 1944 (Tr. 456, 457, 461)

V. E. Ashley, Macri Company's first superintendent (Tr. 1875, 1876, 1877)

J. A. Black, who has charge of Macri Company's fine grading crew (Tr. 852)

M. E. Stickney, Macri Company's superintendent from August until December, 1944 (Tr. 590)

C. E. Hewitt, an engineer employed by Schaefer (Tr. 827)

With respect to the testimony of V. E. Ashley, the court said (Tr. 2210):

> "A significant piece of testimony, it seems to me here, is that of Mr. Ashley, who was Macri's superintendent for a period of time on this job. He testified, if my memory serves me right, that during his period as superintendent he staked out the excavations to be dug, and that his stakes were one foot out from the outer wall of the concrete at the surface of the ground; that he staked them out that way, and certainly the people who came after him would follow the superintendent's directions, and excavate them not more than one foot out, and that's not at the base, it was at the surface, * * *."

The effect of these vertical banks upon Schaefer's performance of his obligations, was of tremendous importance for the reason that they probably constituted the greatest obstacle placed in the path of Schaefer by Macri Company.

In the first place, the walls of the excavations, being practically vertical, were too tight to receive the forms and it was therefore necessary for Schaefer's carpenters who were attempting to erect the forms in the excavations, to excavate further to make room for the forms (Tr. 206, 212, 222, 457, 700). In the second

place, Schaefer, in computing the amount of his bid to Macri Company, assumed that the walls of the excavations would be dug out one foot from the base of the finished concrete structure and on a one to one slope which would have permitted the panels making up the forms to be used repeatedly without trucking them back to the yard. Mr. Schaefer testified that his figure was based on taking panels to the job, building the forms in the excavations, pouring the concrete, then stripping the forms with but very little damage to them, and moving them on to structures ahead instead of hauling them all the way back to the yard (Tr. 225). He said that this could have been done if Macri Company has excavated the walls out one foot and on a one to one slope. He testified, however, that the excavations furnished were so tight that most of the panels could not be removed without being damaged. As a result, most of the panels could not be repaired on the site but had to be returned to the yard for repairs and sent back to the job, perhaps only a stone's throw from the excavation from which they had just been removed (Tr. 226, 343, 344, 345). Furthermore, the damaging of the wood panels shortened their useful life, thereby putting an additional strain upon the inadequate supply of lumber.

Another serious failure of performance on the part of Macri Company was their failure to fine grade the excavations to the proper level. With respect to this the court said (Tr. 101):

> "That the defendants Macri and Company failed to do the fine grading in accordance with the lay-

out plans and specifications; that it was defectively and improperly done and that in most instances the carpenters had to do the fine grading before they could install the forms and that this increased the amount of work the use plaintiff had to do and hindered and interferred with his progress of the work."

This finding is likewise supported by the overwhelming weight of the evidence and it will therefore be necessary simply to list the witnesses who so testified:

M. C. Schaefer (Tr. 212, 221, 233, 280)

Fred Waltie (Tr. 677, 687, 688, 691, 692)

P. L. Darcy (Tr. 456, 457, 459)

M. E. Stickney (Tr. 591, 654, 655)

Hawley Robbins, one of Schaefer's carpenters (Tr. 1031, 1036, 1037)

With respect to the delays on the part of Macri Company in completing the excavations, the court said (Tr. 101):

"That the defendants Macri Company failed to make the excavations on time and in an orderly sequence and manner so as to enable the use plaintiff to proceed as he should have been able to do with prompt progress of the work."

This finding is likewise fully supported by the testimony of the witnesses indicated, on the pages of the transcript just stated. In summarizing their testimony, it may be said that the failure of Macri Company to do the fine grading properly and promptly, imposed the following burdens on Schaefer: Searching for the

Macri Company superintendent or foreman to report that the excavations were not properly fine graded, waiting for the fine graders to return, and doing the fine grading knowing that they might not return within a reasonable time. The testimony indicates that in most instances the grades were too high which necessitated digging out more earth. The amount of earth thus required to be removed varied from one to four or five inches in depth. Several inches in elevation, coupled with dirt piled at the base of the walls, frequently meant that several cubic yards of dirt had to be removed. On one occasion Schaefer's carpenters were required to spend more than eight hours in fine grading one excavation before they could commence the construction of the forms. Fred Waltie testified that on an average about twice as much time as was necessary, was used to construct the forms (Tr. 686).

Concerning the contention of Schaefer that Macri Company failed to furnish an adequate supply of suitable lumber for the construction of the forms, the court made this finding (Tr. 101):

> "That with reference to the lumber which the defendants Macri Company were to furnish under the subcontract on Job 1062, sufficient lumber was not furnished, it was not furnished on time and the quality was not proper and suitable for the work intended; that much of the time there was missing some essential type of lumber so the work was hindered and delayed because of lumber not being properly furnished, not furnished in suffiicient quantity and not furnished in the quality which was the minimum requirement for work of this kind."

One of the principal complaints with respect to lumber was that on many occasions there was either no lumber at all or some essential type was missing. Mr. Schaefer testified that he visited the job on May 3, 1944, and found no excavations ready and no lumber (Tr. 233). He returned to the project on May 19th and again he found no work going on and no lumber (Tr. 280). P. L. Darcy, Schaefer's superintendent after August 10, 1944, testified that he visited the job on June 29th. He said there was no lumber there, and added (Tr. 461, 462):

> "One thing that was wrong with the job was it wasn't moving when I went up there, because there was no lumber to finish setting or tying up forms, to put on strongbacks. * * * Approximately the 8th or 9th of July we got a small load of lumber, about 1500 feet of ship-lap, and a few two by fours, and we did a little form setting with that. * * * It was a fair grade. We repeated our request for lumber on an average of at least four times a week. Lumber was never there when we needed it and we would be promised at least twice a week for sometimes six or seven weeks that we would be having a load of lumber within a few days and it never came. * * *
>
> Q. Now, when you would request additional lumber, would it always be furnished promptly?
>
> A. Never."

The lack of lumber forced additional work upon Schaefer in addition to the frequent delay. Panels which might have been used again without alteration, could not simply be set aside to wait for future use, but had to be rebuilt, because of the lack of lumber, to a different size. (Tr. 463).

Other witnesses confirmed the fact that the supply of lumber was inadequate:

Fred Waltie (Tr. 681)

W. E. Schaefer (Tr. 1081)

Hawley Robbins (Tr. 1040)

M. E. Stickney, Macri Company's superintendent from August until December, 1944, testified that it was his recollection that, "there usually was an order for lumber in the office all the time (Tr. 659, 660)." He said that when requests were received for additional lumber from Schaefer, he, Stickney, relayed them to Mr. Sam Macri and that Mr. Macri's reply was that it would be over within a day or two, or on Monday, but it came very seldom when he promised. Mr. Macri never refused to send the lumber, he said, but he usually made an excuse that he hadn't been able to send it (Tr. 595). Finally, Mr. Stickney testified that Mr. Sam Macri refused to permit him to buy lumber locally when there was none on the project. In fact, he testified that Mr. Macri refused him permission to buy lumber locally, even in an emergency (Tr. 640).

With respect to the quality of the lumber furnished to Schaefer for forms, Hawley Robbins, one of his carpenters from September until practically the end of the job, testified that it was "mighty poor lumber for that kind of work (Tr. 1030)." He said that much of it was wet and green and that it would dry and shrink considerably. He added that it was "awfully knotty,

poor stuff." Some of it was warped to a certain extent. Some of it was second hand and was checked and broken up quite a lot (Tr. 1030).

Exhibit 29 consists of seven pieces of lumber which were delivered to the yard in September, 1944, as part of a quantity of about five thousand feet. Mr. Schaefer testified that they were representative of that particular delivery (Tr. 334 to 341).

In summarizing his findings with respect to the failure of Macri Company to perform their obligations, the court stated that they breached their subcontract in the particulars herein set forth and that "said breach on the part of defendants Macri Company was wilful and negligent." For convenience the finding set forth in full (Tr. 102):

> "That the defendants Macri Company breached their subcontract in the particulars hereinabove set forth and that said breach on the part of defendants Macri Company was wilful and negligent both as to the character of excavations and fine grading and the time it was done and the amount and quality of lumber and the time it was furnished and that this breach on the defendant Macri Company's part was a continuing breach which continued and existed and persisted throughout the entire performance of said contract 1062 until the very end of its performance by the use plaintiff."

The court's conclusion that the failure of Macri Company to perform its obligations was willful and negligent, is fully supported by the testimony.

In the first place, M. E. Stickney, Macri Company's superintendent from August until December, 1944, gave

testimony which has a very important bearing upon this finding. He said that a few days before he went to work, Mr. Sam Macri told him that the excavations "were to be staked one foot outside of the concrete line all around, and dug vertical (Tr. 590)." He also testified that after he went to work he had a talk with Mr. Macri on the job about the fine grading. He said that Mr. Macri told him, "A few tenths of a foot, in elevation one way or the other didn't make any difference, that he was paying Mr. Schaefer extra for a little fine grading anyhow (Tr. 591)." Mr. Stickney stated that he checked certain excavations and found them wrong, and then suggested to Mr. Macri that they go back and fine grade again. He said that Mr. Macri's reply was, "No, that would cost too much money, * * * and what little work there would be, he'd rather pay Mr. Schaefer than put a crew back and fine grade ourselves." Mr. Stickney then testified, "I did return and fine grade some but just the worst of them (Tr. 593)."

Mr. Stickney said that he quit his job following a conversation with Mr. Macri in which the latter said, "It looks like you're trying to work against me, instead of for me (Tr. 598)."

Mr. M. C. Schaefer testified that he had an appointment with Mr. Sam Macri on April 28, 1944, at the job site, but he failed to appear. He said he then told Mr. Staples, Macri Company's superintendent, that he wanted to talk to Mr. Macri before noon the next day, otherwise he would leave the job. Mr. Schaefer

added that Mr. Staples said in reply, "Don't do that, * * * I believe he's going to quit interfering with my program, telling me to lay off men, that I've got too many men on the job (Tr. 212, 213, 215, 218)."

Mr. Schaefer covered in considerable detail two meetings with Mr. Sam Macri on the project, during which he, Mr. Schaefer, presented all of his complaints to Mr. Macri in person. Mr. Schaefer said that at the first meeting on April 29th, Mr. Macri agreed to have the necessary men and equipment on the job and agreed to "get going with the excavating so we can pour the minimum of twenty or twenty-five yards per day," in order that Schaefer would never be "stymied like this again (Tr. 226)." Mr. Schaefer then testified, "His (Macri's) progress or his method of excavating was no different from that time on; there wasn't any improvement in his operation." He said that there was no one to one slope, the walls were vertical and there was no more clearance than before, and that the fine grading was in the same terrible condition (Tr. 231). Mr. Schaefer testified that at the second meeting on June 15th he told Mr. Macri, "If Staples had any cooperation from you he would have done a whole lot better because you've been telling him to lay off." He added, "I told him I didn't believe you've ever given him instructions to excavate according to specifications, otherwise he would be doing it." Macri's reply to this accusation was simply, "we're getting started (Tr. 286)."

Mr. Darcy, Schaefer's second superintendent, tes-

tified that he asked V. E. Ashley, Macri Company's superintendent from June until August, why he left the job, and Ashley replied that it was because he didn't get the machinery he needed when he asked for it, he couldn't get lumber when it was needed and asked for, and because he had negotiated with two different engineers to take over the grading on that work but when he had consulted with Mr. Macri the latter refused to pay the required wage scale and Mr. Ashley couldn't put them on as the men wouldn't work for any less, and finally because he didn't have equipment to handle fine grading crews, that is, to get them around on the job (Tr. 2172).

Mr. Waltie, Schaefer's first superintendent, also testified with respect to the meeting of June 15, 1944, between Mr. Schaefer and Mr. Macri. He said that in connection with the fine grading Mr. Macri said that two or three tenths of a foot in grade was nothing to be concerned about and that it wouldn't amount to anything. Mr. Waltie then testified that in most cases two or three tenths of a foot would actually be a couple of cubic yards of earth to be taken out of the excavation, when added to the earth at the base of the walls (Tr. 699).

Mr. W. E. Schaefer also testified that in a conversation with Mr. Staples, one of Macri Company's superintendents, the latter said to him, "I know your outfit is a good operator, and I hate to be holding you back like this, but I can't get any co-operation with

Macri." This conversation took place on May 19, 1944 (Tr. 1083).

Immediately after the commencement of work by Schafer, complaints were made by his men that Macri Company was not complying with the terms of the subcontract. In fact, the evidence indicates that such complaints were made repeatedly throughout the performance of the work by Schaefer. The failure on the part of Macri Company to perform his obligations led to two important meetings between Mr. Schaefer and Mr. Macri. The court's finding with respect to these complaints and meetings is as follows (Tr. 102):

> "That immediately after the commencement of the work by the use plaintiff Concrete Construction Company the said use plaintiff and his representatives complained to the defendants Macri Company and to Mr. Sam Macri and to his agents on the job as to the failure of the defendants Macri Company to comply with the terms of its subcontract, and that said use plaintiff stated he would pull off the job if conditions were not improved and that the defendants Macri Company on several occasions promised that they would do better and that they would see that their work was done in accordance with the requirements of the subcontract and in a proper manner and advised the use plaintiff that if he would go on and complete the contract that the use plaintiff wouldn't lose anything on the contract and that the defendant's Macri Company would make it right and would pay the use plaintiff for what he might lose under the adverse conditions created by the defendants Macri and Company's failure to do their work properly; that by said promises the defendant Macri Company induced the use plaintiff to proceed with the work and the use plaintiff did proceed with the

work by reason of said representations, and that there was an implied agreement or a quasi-contract that the use plaintiff, M. C. Schaefer, was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon said use plaintiff by Macri Company's breach and failure to perform his part of the subcontract in the particulars herein set forth."

Because of the importance of the conversations at the meetings mentioned, they will be set forth in some detail.

On April 29, 1944, approximately six weeks after the subcontract was executed, the two men met at the job office. They drove out to the field and, in the company of W. E. Schaefer and George Staples, stopped at structure No. 18 where Fred Waltie, Schaefer's superintendent, and George Schuler, a form setter, were excavating. Mr. Schaefer told these men to stop their work, his reason being that the excavating was not a part of the subcontract (Tr. 219, 220). The group of men checked six or seven excavations and all were defective in the particulars heretofore mentioned (Tr. 220,221). Mr. Macri told Mr. Schaefer that the latter should take care of the two or three tenths of a foot of fine grading, but Mr. Schaefer responded by saying that he wouldn't have a thing to do with it. Mr. Macri then replied. "We'll get the excavating right from now on," and then told his superintendent, Staples, to get the men in and get "this little grading done." Mr. Macri asked Mr. Schaefer to do the excavating, saying that he would pay for it, but Mr. Schaefer refused to

undertake the work and asked Mr. Macri to have sufficient men there so he wouldn't be delayed, that the excavations be done according to specifications and that ample lumber be supplied in time so that Schaefer's men could pour not less than 20 yards of concrete per day. Mr. Schaefer reminded him of his promise to so perform his obligations that Schaefer would be off the job by September 15th, that is, off both jobs, 1062 and 1068, by that date. Mr. Macri replied, "You'll be out of here by September 15th, there isn't gonna be anybody lose any money on our job; we'll get this thing straightened out and get going. * * * I'll pay you for the expense of excavating that you do here (Tr. 221 to 224)." Mr. Schaefer's reply to these words was, "Who's going to pay for the extra expense of building panels in the way that we're now required to build panels, or setting these panels in holes like this, * * instead of to specification, of stripping the forms out of these holes, doing the necessary excavating to get them out, wrecking them, having to haul them all back to the yard for repair, instead of to structures ahead?" The following conversation then took place. Mr. Macri said, "I'll pay you for all the extras, just get going." Mr. Schaefer replied, "You're going to pay for all the additional cost and expense." Mr. Macri then said, "I told you that before." Mr. Schaefer then added, * * * You're going to have the necessary men and equipment in here, and you're going to get going with the excavating so we can pour the minimum of twenty or twenty-five yards per day (Tr. 225 to 227)." Mr. Macri then

Mr. Schaefer returned to the project on May 19th and found no work going on and no lumber. The side walls still required additional digging to accomodate the forms and there were no excavations ready for forms. Mr. Schaefer then instructed his superintendent to take all of the men back to Portland with the exception of two (Tr. 279, 280, 282).

Mr. Schaefer met Mr. Macri again on June 15th, on the project. The others present at the meeting were Fred Waltie, Allyn Hunter and Mr. Cohen, a Macri Company engineer. All of these men testified except Mr. Cohen. There was still nothing being done. The shovel was broken down and was in the yard. Macri Company did not have a hand excavating crew on the job. In fact, there was no one on the job (Tr. 284, 285, 286). At that time enough forms had been prepared to permit the assembly of about 72 to 75 structures, the term used to designate the forms when ready to recieve concrete. There were no excavations ready for the placing of the structures, however, and, in fact, none was ready to receive forms until June 29th. On that day Mr. Macri demanded that Schaefer get back on the job, and the men returned from Portland to the project a few days later (Tr. 325, 326). At the meeting of June 15th another conversation was held between Mr. Macri and Mr. Schaefer which was substantially similar to that of April 29th. After discussing the general situation, Mr. Schaefer said to Mr. Macri, "We won't be through with this job by September 15th." Mr. Macri replied "Nobody's lost any money on my job.

We'll be out by September 15th. This little excavating, you go ahead and do it. We'll pay for it." Mr. Schaefer then said, "That isn't all you're going to pay for. You're going to pay all the costs, all the expenses, all the extras." Mr. Macri replied, "Well, I told you that before; quit arguing. * * * You're not going to have to wait for anything any more. You just get back here and get going." Mr. Schaefer then said to him, "We'll want to have enough holes ahead for at least 80 structures of concrete, * * * so we'll have at least four days of pour (Tr. 286, 287)."

W. E. Schaefer testified that on April 29th, his brother told Mr. Macri that he didn't want anything to do with the excavating, the fine grading, saying, "We've spent too much money on this now, trying to get started. If this keeps up, we'll tear these forms out, they'll have to go back to the shop and repair them, they'll wreck them when they take them out, where otherwise we could take these panels to another structure without hauling them to the yard and hauling them back." Mr. Macri then replied, "Don't worry about that. I'll pay all your costs and expenses on that; just let's get started and quit arguing about it (Tr. 1079)." With reference to the amount of money Schaefer would make on this job, Mr. Macri said, "Nobody ever lost any money on Macri's job, and we wasn't either; that we should make between $11,000 and $12,000 on this job (Tr. 1080)."

Mr. Waltie and Mr. Hunter substantiated the testimony concerning these meetings (Tr. 694, 695, 696, 698, 922, 923).

Reference has been made by opposing counsel to the testimony of H. T. Nelson, an assistant director of the Bureau of Reclamation, that there was an over-run of concrete of 14.5 per cent which indicates that there was a loss of concrete between the time it left the mixer and was placed into the forms. He testified that a portion of this loss could be accounted for as spillage and small losses in handling, but that the major portion of it would be represented by excesses required by forms larger than specified, and excavations below the specified grade (Tr. 1536, 1537). He admitted that an inspector of the Bureau of Reclamation was required to approve the structures before concrete was poured in there (Tr. 1357). There was very little spillage on this project (Tr. 557, 558).

The testimony relating to the correct amount of Schaefer's recovery is analyzed under heading V of this brief and the facts will not be stated in detail at this point. Two exhibits should be mentioned, however, which have an important bearing upon the amount of Schaefer's recovery. Exhibit 63 was prepared by a certified public accountant at Mr. Schaefer's request, from the records of his company. It itemizes Schaefer's costs and expenses by months and formed the basis of the trial court's decision (Tr. 103, 104, 112, 1240, 1241 to 1252). Exhibit 51 is a chart prepared by Schaefer showing the percentage of his total performance each day in the various classifications of the work, and the number of men employed each day in each classification (Tr. 572, 586). The estimated performance also appears on

this chart, and when this is compared with the actual performance, the delays to which Schaefer was subjected by Macri Company's failure of performance will be readily apparent. One striking feature of Exhibit 51 is that it indicates that during the final 30 days of the job Schaefer was able to pour 30 per cent of the entire amount of concrete required, and during the final month he was able to strip the forms from 39 per cent of the completed structures. A further analysis of this exhibit under heading V indicates that this demonstrated capacity on Schaefer's part to perform his contract, establishes that he could have performed all of the work required of him within from three and one half to four months. This would have been within the estimate of two witnesses, P. L. Darcy and L. E. Bufton, and indicates that the delay in completion of the project was not brought about by any fault or incapacity on the part of Schaefer.

It should be mentioned that there is an inaccuracy in the transcript, page 1723, in reporting the testimony of Mr. M. C. Schaefer. In the fourth line from the top of that page his answer is stated to be that 40 batches of concrete were poured in March, 1945. This should have been reported and transcribed as 400 batches. Exhibit 51 indicates that 30 per cent of the entire quantity of concrete was poured in that month. 30 per cent of the total amount poured, 1,356.697 cubic yards, is 407 cubic yards. The latter figure corresponds with the testimony of Mr. Schaefer in that he testified that a batch contained slightly more than one cubic yard (Tr. 1717).

In January, 1945, a meeting was held in Seattle attended by Mr. Sam Macri, Mr. Schaefer, and their attorneys, to arrive at a new price, if possible, for the work performed by Mr. Schaefer in the performance of the subcontract. They were unable to reach an agreement, but one part of their conversation should be recorded here. Mr. Holman, counsel for Macri Company, said, in answer to a question asked him by Mr. Schaefer, that if Macri Company was being paid for their excavations on the basis of a clearance of one foot out from the base of the completed structure and a slope of one to one, "You (Mr. Schaefer) may have a good legitimate claim against Sam Macri Company (Tr. 2022)." The government did pay Macri Company on the basis of excavations prepared with that clearance and slope, rather than on the quantity of earth actually removed (Tr. 1026, 1496, 1524, 2209).

ARGUMENT

Summary of Argument

I. Schaefer has a right to recover from Macri Company in quantum meruit, the reasonable value of all labor and materials furnished by him on this project, including overhead and profit, less what he has already received, for the reason that Macri Company were guilty of willful, total breaches of the subcontract.

II. Schaefer has a right to recover from Macri Company in quantum meruit, the reasonable value of the labor and materials supplied by him, including overhead and profit, for the reason that Mr. Macri promised to

pay Mr. Schaefer's costs under such circumstances that the doctrine of promissory estoppel precludes Macri Company from denying the enforceability of such promises. There was a total breach of such promises.

III. Schaefer has a right to recover from Macri Company in quantum meruit, the reasonable value of the extra labor and materials furnished by him, including overhead and profit, for the reason that Macri Company became obligated by an implied in fact agreement to pay that amount and were guilty of a total breach of that agreement by failing to do so.

IV. The findings of fact of the trial court with respect to the question whether Macri Company were guilty of breaches of the subcontract, are supported by substantial evidence and are, therefore, not clearly erroneous.

V. The judgment against Macri Company should be affirmed for the reason that the evidence establishes that the amount of the judgment correctly represents the sum to which Schaefer is entitled.

VI. Schaefer is entitled to a decision that he had capacity to sue in the District Court.

VII. Schaefer has a right to a judgment against the Continental Casualty Company in the same amount as the judgment against Macri Company, inasmuch as he has a right to recover from Macri Company under principles of contract law, and the amount of the recovery should be the same against both. The items allowed by the trial court are within the liability of the Continental Casualty Company as surety for Macri Company.

I.

SCHAEFER IS ENTITLED TO RECOVER FROM MACRI COMPANY IN QUANTUM MERUIT, THE REASONABLE VALUE OF THE LABOR AND MATERIALS FURNISHED BY HIM, LESS THE AMOUNT HE HAS RECEIVED, DUE TO MACRI COMPANY'S WILLFUL BREACHES OF THE SUBCONTRACT

The basis for this contention is that the trial court found, and there is substantial evidence tending to establish, the following facts: (1) Macri Company were guilty of willful and negligent, material breaches of the subcontract throughout the performance of the work by Schaefer, in the respects mentioned in the Statement of Case. (2) Schaefer furnished labor and materials and performed services for Macri Company at their request of the reasonable cost and value stated in the trial court's findings of fact (Tr. 103, 104).

It is established beyond any doubt that where one of the parties to a contract is guilty of a material breach, the injured party may recover the reasonable value of the labor and materials which he furnished to the other party, in quantum meruit.

(1) *United States v. Zara Contracting Co.*, 146 Fed. 2d. 606 (C.C.A. 2). This was an action under the Miller Act. The plaintiff, a subcontractor agreed to do all excavating on a project. He encountered unexpected difficulty due to the character of the soil. As a result his progress became slow and the defendant, the general

contractor, took over the excavating and finished the job, claiming that the plaintiff had breached the subcontract. In this action the plaintiff sought to recover in quantum meruit the reasonable value of the work performed by him, on the ground that the defendant had breached the subcontract. A judgment for the plaintiff against the defendant and its surety was increased and affirmed on appeal. The court said that a promisee, after a breach by the promisor, may forgo any suit on the contract and claim the reasonable value of his performance. The court added that the promisee under these circumstances is not limited in his recovery to the contract price.

(2) *McDonald v. Supple,* 96 Or. 486, 190 P. 315. The plaintiff's decedent agreed to assemble certain dredge hulls for the defendant at stated prices. The defendant was guilty of numerous breaches of the contract with the result that the decedent's performance became extremely burdensome to him and his costs were two or three times greater than they otherwise would have been. The court affirmed a judgment in favor of the plaintiff based upon the reasonable value of the services performed by the decedent. The court said that the defaults on the part of the defendant in the performance of the original contract were so numerous and so vital that they caused the decedent to perform his labor under different conditions, at a different time and in a different manner than originally contemplated which rendered the performance so burdensome that he was not required to accept the compensation fixed in the original contract.

(3) *Great Lakes Construction Co. v. Republic Creosoting Co.,* 139 Fed. 2d. 456 (C.C.A. 8). The plaintiff, a subcontractor, agreed to construct the floor in a post office building. The defendant, general contractor, agreed to prepare the building for the floor by a certain date. The plaintiff was unable to complete the work because the defendant had not made the necessary preparation. Many months later the defendant stated that the location was ready and demanded that the plaintiff complete the floor. He refused to do so, however, unless the defendant increased his compensation, for the reason that the cost of labor and materials had increased materially in the intervening months. In this action under the Heard Act, the predecessor of the Miller Act, the plaintiff was permitted to recover in quantum meruit the reasonable value of the labor and materials furnished by him in the performance of his contract. The basis of the court's decision was that the defendant was guilty of a breach of contract in failing to make the building ready to permit the completion of the floor and that the plaintiff was justified in refusing to finish his performance after the long delay.

(4) *Nelson v. City of Seattle,* 180 Wn. 1, 38 P. 2d. 1034. Nelson entered into a contract with the City to regrade Denny Hill by the removal of earth. Nelson and Vigilant entered into a subcontract by which the latter agreed to receive the earth alongside barges in the bay, and to haul the earth into the bay and dump it. It was also agreed that Vigilant should be prepared to receive a quantity of 14,400 cubic yards daily, which would have

permitted completion of the entire project in one year. The subcontract stated that if the work extended beyond the year Vigilant should receive $70.00 per day for his work thereafter, until the project was completed. The court held that because Nelson failed to move the dirt as rapidly as expected and because the work extended over a much longer period than was anticipated, Vigilant was not bound to accept $70.00 per day for his compensation beyond the year. The court held that he was entitled to the reasonable value of his services for the entire period beyond the year for which Nelson was responsible, and affirmed the judgment awarding Vigilant $129.00 per day for that period. The court said:

> "* * * it is not conceivable that Vigilant intended or that Nelson expected, that the former would for one half year longer perform a service for $70.00 a day upon which he had bid at the rate of $225.00 a day. So, it would seem to follow that, in so far as performance by Vigilant was delayed beyond one year through Nelson's failure to deliver 14,400 yards of material a day, the former would be entitled to recover the reasonable value of its services."

In the following cases the courts stated and applied the same principle and permitted a recovery in quantum meruit.

Schuehle v. City of Seattle, 199 Wash. 675, 92 P. 2d. 1109.
Sofarelli Bros. v. Elgin, 129 Fed. 2d. 785 (C.C.A. 4).
Schwasnick v. Blandin, 65 Fed. 2d. 354 (C.C.A. 2).

It is respectfully contended on behalf of Schaefer that these decisions govern this situation.

It is contented by counsel for Macri Company that there can be no recovery in quantum meruit in this case for these reasons: (1) Assuming that Macri Company were guilty of continuing total breaches of the subcontract, Schaefer elected to continue his performance and thereby waived his right to regard the breaches as total, and rendered them partial breaches of contract. (2) There can be no recovery in quasi contract following the waiver of such total breaches, and the only remedy available to Schaefer for the partial breaches of contract is a recovery of damages against Macri Company measured by the increased cost of Schaefer's performance due to such partial breaches of the contract.

In support of these contentions counsel for Macri Company rely upon Section 317 of the Restatement of the Law of Contracts, and the other authorities cited in their brief, pages 40 to 42. It is conceded by counsel for Schaefer that the principle relied upon by counsel for Macri Company is sound and that it does govern certain situations, but we respectfully contend that it should not be applied in the present case for the reason that the breaches of contract on the part of Macri Company were willful.

It is an established principle of contract law, having particular application to construction contracts, that a builder is entitled to recover the contract price even though there are some defects or omissions in his performance, if it can be said that he has substantially performed the contract. The owner is then entitled to sufficient compensation from the builder to permit the

defects to be corrected or the omissions to be supplied.

3 Williston on Contracts, Sections 805 and 842.
Patrick v. Bonthius, 13 Wash. 2d. 210, 124 P. 2d. 550.
Wray v. Young, 122 Wash. 330, 210 P. 794.
Edmunds v. Welling, 57 Or. 103, 110 P. 533.

There is an exceedingly important limitation upon this principle, however. It is said by the text writers and it has been repeatedly held by the courts that the principle does not apply if the builder willfully fails or refuses to perform the contract in accordance with the plans and specifications.

In 3 Williston on Contracts, Section 805, it is said:

> "Where the rule of substantial performance prevails it is essential that the plaintiff's default should not have been willful; and the defects must not be so serious as to deprive the property of its value for the intended use nor so pervade the whole work that a deduction in damages will not be fair compensation."

In *Patrick v. Bonthius, supra,* 13 Wash. 2d. 210, 124 P. 2d. 550, the limitation is stated in these words:

> "The rule is for the benefit of the honest, skillful and prudent contractor who faithfully endeavors to live up to the terms of his agreement, but through mistake or inadvertence fails in unimportant particulars."

In each of the following cases the court refused to apply the doctrine of substantial performance, because the failure of the builder to comply strictly with the plans and specifications, was willful.

Golwitzer v. Hummel, 201 Ia. 751, 206 N.W. 254.
Typhoon Air Conditioning Co. Inc. v. Fried, 147 Pa. Super. 605, 24 A. 2d. 926.
Turner v. Henning, 262 F. 637 (Ct. App. D.C.).
See also: *Casinelli v. Stacy,* 238 Ky. 827, 38 S.W. 2d. 980.

Section 357 of the Restatement states the effect of a willful breach in these words:

"(1) Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or nonperformance of a condition, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment * * * for the amount of such benefit in excess of the harm that he has caused to the defendant by his own breach, in no case exceeding a ratable proportion of the agreed compensation, if

(a) The plaintiff's breach or non-performance is not willful and deliberate; * * *."

This section of the Restatement and the three cases previously cited in a group, permit a plaintiff who has been guilty of willful breaches of a contract, to recover no more from the other party than the value of the net benefit conferred on that party by the plaintiff.

The significance of these principles relating to the effect of a willful breach of contract, may be briefly stated:

By reason of their willful breaches of contract, Macri Company would not have been entitled to rely upon the doctrine of substantial performance if Schaefer had not fully performed, and could not, therefore, have secured

full performance from Schaefer in accordance with the terms of the contract, and limited his recovery to damages in an amount sufficient to correct the defects or supply the omissions in Macri Company's performance.

That being so, Macri Company's only remedy for a failure of performance by Schaefer would have been an action based upon Section 357 of the Restatement, and their recovery would have been the net benefit conferred by Macri Company upon Schaefer. But the net benefit here was a minus quantity and the principles of quasi contract which give a remedy when necessary to avoid an unjust enrichment, declare that Schaefer should recover in quantum meruit from Macri Company the difference between the benefits conferred by each of these parties upon the other.

Stating this in another way, if Macri Company would not have been entitled to avail themselves of the doctrine of substantial performance, they would not have been entitled to limit Schaefer's recovery against Macri Company to an action for damages. This analysis leads to but one conclusion: If Schafer would have had the right to limit Macri Company's recovery to the net benefit conferred upon him, because of their willful breach, Schaefer himself has the right to recover the net benefit conferred by him upon Macri Company, in quantum meruit. It is evident, therefore, that Section 317 of the Restatement was not intended to apply to this situation, and that Schaefer's right to recover damages for breach of the subcontract, is not his only remedy.

Section 347 of the Restatement provides:

"Restitution of Value of a Performance Rendered by One Party as a Remedy for Total Breach by the Other.

"(1) For the total breach of a contract, the injured party can get judgment for the reasonable value of a performance rendered by him, measured as of the time it was rendered, less the amount of benefits received as part performance of the contract and retained by him, if the requirements of the rules stated in Sections 348-357 are satisfied and if the performance so rendered was

"(a) a part or all of a performance for which the defendant bargained; * * *."

The only rule among those stated in Sections 348 to 357 which might limit the right of Schaefer to recover in quantum meruit is found in Section 350 which contains these words:

"Effect of Full Performance by the Plaintiff.

"The remedy of restitution in money is not available to one who has fully performed his part of a contract, if the only part of the agreed exchange for such performance that has not been rendered by the defendant is a sum of money constituting a liquidated debt; but full performance does not make restitution unavailable if any part of the consideration due from the defendant in return is something other than a liquidated debt."

A substantial part of the obligation of Macri Company was unquestionably unliquidated at the time of commencement of this suit for the reason that litigation was necessary to determine whether Schaefer had the right to include overhead and profit as part of his costs and, if so, the amount of such overhead and profit

properly chargeable to the Macris.

Nelson v. City of Seattle, supra, 180 Wash. 1, 38 P. 2d. 1034.

It is established that Schaefer's recovery in quantum meruit is not limited to his actual cash expenditures for labor and materials, but he may recover, in addition, reasonable overhead and profit. In other words, Schaefer is entitled to recover the amount Macri Company would have been compelled to pay in the open market for the labor and materials which were actually furnished by him. This is established by the following authorities.

Comment c following Section 347, states:

"If the plaintiff's performance is part of the very performance for which the defendant bargained as part of an agreed exchange, it is to be valued, not by the extent to which the defendant's total wealth has been increased thereby, but by the amount for which such services and materials as constituted the part performance could have been purchased from one in the plaintiff's position at the time they were rendered."

There is an excellent discussion of this subject in 5 Williston on Contracts, Section 1480.

This measure of recovery was approved in the following cases:

(1) *United States v. Zara Contracting Co., supra,* 146 Fed. 2d. 606 (C.C.A. 2). The court held, in the language of the Restatement, that the plaintiff's performance was to be valued by the amount the services and materials supplied by the plaintiff, "could have been purchased from one in the plaintiff's position" at

the time they were supplied. A judgment for the plaintiff was increased and affirmed.

(2) *Schwasnick v. Blandin, supra,* 65 Fed. 2d. 354 (C.C.A. 2). In reliance upon the same section of the Restatement and 5 Williston on Contracts, Section 1480, the court held that the plaintiff could recover the reasonable value of his services, "measured by what he could have got for them in the market, and not by their benefit to the promisor."

(3) *Sofarelli Bros. v. Elgin, supra,* 129 Fed. 2d. 785 (C.C.A. 4). The court here allowed recovery of overhead.

(4) *Nelson v. City of Seattle,* 180 Wash. 1, 38 P. 2d. 1034. The court allowed fifteen per cent for profit, "the going rate on City contracts."

If an injured plaintiff is entitled to recover the market value of the labor and materials furnished by him, it is clear that overhead and profit should be included in the sum awarded him, inasmuch as any one offering to furnish labor and materials in the open market naturally includes overhead and profit in the amount of his offer.

It is respectfully submitted, therefore, that Schaefer should recover in quantum meruit the amount allowed by the court, including overhead and profit, less what he has received. The correct figures have been determined under heading V.

It is contended by Macri Company that Schaefer is not entitled to recover because he failed to minimize his damages (Brief 57). Schaefer performed as he was

asked to do, and he did nothing he was not required to do, to complete that performance. It could hardly be said, therefore, that he failed to minimize his damages.

II.

SCHAEFER IS ENTITLED TO RECOVER FROM MACRI COMPANY THE AMOUNT OF HIS CLAIM, FOR THE REASON THAT AN INJUSTICE CAN BE AVOIDED ONLY BY ENFORCEMENT OF MACRI COMPANY'S PROMISES TO PAY SCHAEFER'S COSTS AND EXPENSES, AND MACRI COMPANY IS ESTOPPED TO ASSERT THAT THEIR PROMISES ARE NOT BINDING UPON THEM, SUCH RECOVERY BEING IN QUANTUM MERUIT

This contention is based upon the following established facts: From the beginning, Macri Company knew that they were not performing their duties in accordance with the specifications. They knew, furthermore, that Schaefer was refusing to perform any of Macri Company's work and that he was actually unable to do his own until Macri Company had completed what they were required to do. In this state of affairs, Mr. Macri promised "to do better". He also promised on two occasions to pay Schaefer's costs, but it is not entirely clear whether he promised to pay all of Schaefer's costs and expenses, or the additional costs and expenses made necessary by Macri Company's failure to perform their

obligations. There is evidence supporting each view, but it is entirely immaterial which is adopted, as the governing rules of law and extent of recovery are the same in each instance. The trial court intimated that he inclined toward the latter (Tr. 103, 2214, 2215), but he actually decided Schaefer should recover all costs and expenses less what he had already received (Tr. 103, 104, 112). Hereafter these promises will be stated to be simply, "to pay Schaefer's costs and expenses."

Macri Company should reasonably have expected that the promises to pay Schaefer's costs would induce Schaefer to do all of Macri Company's work which they left undone, in order that Schaefer might make certain that he could fully perform all of his own obligations. Macri Company knew that Schaefer himself had executed a performance bond and that he would have been liable to both Macri Company and the surety in the event of a default on his part. In that event, either the surety or Macri Company would have taken over Schaefer's obligations and performed his contract, with resulting loss of profits and prestige to Schaefer.

In reliance upon these promises, Schaefer continued to perform his duties and, in fact, completed everything he was required to do. In so carrying out his own work, Schaefer performed a considerable portion of Macri Company's duties which increased his costs to an amount between two and three times greater than would have been necessary if Macri Company had performed according to specifications. Macri Company did not "do better," and performance of the prime contract with

the government would have been delayed far beyond its actual completion, if Schaefer had not done a considerable portion of Macri Company's work. Macri Company, of course, received the full benefit of the labor and materials furnished by Schaefer.

The contention considered under this heading is based upon the principle stated in Section 90 of the Restatement of the Law of Contracts in these words:

> "*Promise reasonably inducing definite and substantial action.* A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

1 Williston on Contracts, Section 139.
3 Williston on Contracts, Sections 679 and 689.

That principle was applied in the following decisions:

(1) *Albachten v. Bradley,* 212 Minn. 359, 3 N.W. 2d. 783. The plaintiff pressed the defendant for payment of a note. Finally, the defendant orally asked the plaintiff to wait until several months after an action on the note would be barred by the statute of limitations, although no mention was made of the statute. The reason given by the defendant for his request was that he expected to secure certain collateral from the bank by then. The defendant said, "You won't have to start an action to collect. You will not lose anything by waiting." The plaintiff did wait until after the action was barred, but the defendant then refused to recognize his obligation. The trial court directed a verdict in favor of the

defendant. On appeal the supreme court granted a new trial. The court said that the defendant's assurance that the plaintiff would not lose anything by waiting was in effect an agreement that the statute of limitations would not be asserted as a defense by the defendant, and held that the defendant was therefore estopped to plead the statute although it provided that no acknowledgment or promise should be evidence of a new or continuing contract sufficient to take the case out of the operation of the statute "unless the same is contained in writing signed by the party to be charged thereby."

(2) *Fried v. Fisher,* 328 Pa. 497, 196 Atl. 39. The plaintiff in that case leased certain premises to the defendants, partners, for a term. During the term the defendant Fisher desired to withdraw from the partnership and enter another business. He asked the plaintiff to release him, Fisher, from the obligations of the lease, and stated the reason for his request. The plaintiff said that he was perfectly satisfied to have the other partner assume the obligations of the lease. Fisher then withdrew from the partnership and went into another business. Thereafter the plaintiff brought this action against both of the partners to recover unpaid rent. The court held that the defendant Fisher was not liable to the plaintiff because of the application of the doctrine of promissory estoppel. The opinion of the court traces the history of the doctrine of promissory estoppel and cites and considers many cases.

(3) *Luther v. National Bank of Commerce,* 2 Wash. 2d. 470, 98 P. 2d. 667. The decedent was in poor health

and wished someone to take care of him for the remainder of his life in his home rather than in a hospital. The plaintiff was a nurse who was operating a private hospital. The decedent told her that if she would give up her hospital, come to live with him, nurse him throughout the remainder of his life and never send him to a hospital, he would provide her a good living, build and give her a home and if he should predecease her, will his entire estate to her. The plaintiff accepted his proposal in full and took care of him for ten years in his home. The decedent asked her to marry him when she moved into his home and she did so. The trial court, and on appeal the supreme court, enforced the oral agreement made by the decedent, granting specific performance to the plaintiff. The court held that the decedent's promise was supported by consideration, but added that the principle of Section 90 of the Restatement applied. The court said:

> "It seems to us that it would be a gross injustice to deny respondent the benefit of her bargain, which she performed to the letter, merely because by operation of law the services which she rendered subsequent to marriage are held to be without consideration."

(4) *Alameda County Title Insurance Co. v. Panella,* 218 Cal. 510, 24 P. 2d. 163. The court held that the doctrine of promissory estoppel was not applicable in that case for the reason that the parties entered into a written contract after they made the oral agreement relied upon by the defendant to create the promissory estoppel. The court discussed the circumstances under which the doctrine should be applied, saying:

"The promisor may be estopped to raise the defense that a written contract can be modified only by a contract in writing or an executed oral agreement, in like manner as he may be estopped to plead the statute of frauds upon an original contract required to be in writing."

Hanna State & Savings Bank v. Matson, 53 Wyo. 1, 77 P. 2d. 621.
Sessions v. Southern California Edison Co., 47 Cal. App. 2d. 611, 118 P. 2d. 935.
Panno v. Russo, ... Cal. App. 2d. ..... , 186 P. 2d. 452.
Frey v. Corbin, ... Cal. App. 2d. ..... , 191 P. 2d. 21.
Raldne Realty Corp. v. Brooks, 281 Mass. 233, 183 N.E. 419.
In re First-Central Trust Co., 75 Oh. App. 1, 60 N.E. 2d. 503.
Martin v. Dixie Planing Mill, 199 Miss. 455, 24 So. 2d. 332.

In *Nelson v. City of Seattle,* 180 Wash. 1, 38 P. 2d. 1034, 1041, the court said, with respect to a promise made without consideration:

"Nelson (the general contractor) was anxious to have the work progress with as great speed as possible. Hence his proposal to pay half the rental of the additional tug and allow Vigilant (the subcontractor) the use of the scow without charge. Vigilant having acted upon the oral agreement, Nelson could not thereafter withdraw from it."

It is evident that the facts of this case bring it within the operation of the principle stated in Section 90 of the Restatement and the cases cited. The result is that the promises of Macri Company to pay Schaefer's costs are

binding on them, and since they have not performed those promises Schaefer is entitled to pursue all appropriate remedies for breach of contract.

Macri Company have paid only about one-third of Schaefer's total costs and expenses shown by Exhibit 63, the audit which formed the basis for the judgment of the trial court (Tr. 104, 112, 1241, 1252), and, consequently, none of his extra costs and expenses. It is clear, therefore, that their failure to perform their oral promises constitutes a total breach of such promises within the meaning of Section 317 of the Restatement.

That being true, Schaefer is entitled to a recovery in quantum meruit, by reason of the principle stated in Section 347 of the Restatement, based on the value of the labor and materials furnished by him.

Section 347 states:

> "*Restitution of Value of a Performance Rendered by One Party as a Remedy for Total Breach by the Other.*
>
> "(1) For the total breach of a contract, the injured party can get judgment for the reasonable value of a performance rendered by him, measured as of the time it was rendered, less the amount of benefits received as part performance of the contract and retained by him, if the requirements of the rules stated in Sections 348-357 are satisfied and if the performance so rendered was
>
> * * * *
>
> "(b) rendered in reliance upon the other party's promise and of a kind sufficient to make that promise enforceable under the rule stated in Section 90."

The only rule among those stated in Sections 348 to 357 which might limit the right of Schaefer to recover in quantum meruit is found in Section 350 which contains these words:

> *"Effect of Full Performance by the Plaintiff.*
>
> "The remedy of restitution in money is not available to one who has fully performed his part of a contract, if the only part of the agreed exchange for such performance that has not been rendered by the defendant is a sum of money constituting a liquidated debt; but full performance does not make restitution unavailable if any part of the consideration due from the defendant in return is something other than a liquidated debt."

A substantial part of the obligation of Macri Company was unquestionably unliquidated at the time of commencement of this suit for the reason that litigation was necessary to determine whether Schaefer had the right to include overhead and profit as part of his costs and, if so, the amount of such overhead and profit properly chargeable to the Macris.

> *Nelson v. City of Seattle, supra,* 180 Wash. 1, 38 P. 2d. 1034.

It is respectfully submitted, therefore, that Schaefer is entitled to a judgment against Macri Company for the reasons stated herein.

The correct amount of his recovery is determined under head V of this brief, on the basis of each view of the testimony with respect to the extent of Mr. Macri's promises. If he promised to pay all of Schaefer's costs and expenses, the latter should recover the reasonable

value of all labor and materials furnished by him, less what he has already received. If Mr. Macri promised to pay his additional costs and expenses, Schaefer should recover the reasonable value of all additional labor and materials furnished by him, plus the portion of the contract price remaining unpaid. In either event, he is entitled to overhead and profit in amounts proportionate to his recovery, for the reasons stated under heading I.

III.

SCHAEFER IS ENTITLED TO RECOVER FROM MACRI COMPANY THE REASONABLE VALUE OF THE EXTRA LABOR AND MATERIALS FURNISHED BY HIM, ON THE BASIS OF AN IMPLIED IN FACT AGREEMENT TO PAY FOR THEM

This contention is based upon these established facts. From the beginning Macri Company knew that they were not performing their obligations under the subcontract according to the specifications and knew that Schaefer was doing a considerable portion of Macri Company's work. At the meetings of April 29th and June 15th, 1944, Mr. Macri asked Mr. Schaefer to perform a substantial portion of the work required to be done by Macri Company, particularly the fine grading. Mr. Schaefer refused to take over the fine grading. Mr. Macri promised, "to do better" after these meetings, but he failed to show any improvement. It was still necessary, therefore, that Schaefer do a substantial

amount of work required by the subcontract to be done by Macri Company, if the prime contract was to be finished within a reasonable time. Schaefer, accordingly, continued to do Macri Company's work and this was fully known to the latter. Macri Company accepted this work and secured the full benefit of it in the form of compensation from the Bureau of Reclamation. The work done by Schaefer beyond that which would ordinarily have been required of him by the subcontract, was not a gratuity on his part. He expected full compensation for it, and a reasonable man in the position of Mr. Macri should have understood that such was Mr. Schaefer's expectation.

In this situation it is believed that the authorities unanimously declare that Schaefer is entitled to recover from Macri Company the reasonable value of the extra labor and materials furnished by him, on the basis of an agreement implied in fact, and decisions support this conclusion.

Section 72 of the Restatement of the Law of Contracts contains these words:

> "(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others:
>
> "(a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.
>
> * * * * *
>
> "(2) Where the offeree exercises dominion over

> things which are offered to him such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance * *."

The following illustration of subsection (1a) appears in the discussion following Section 72:

> "A gives several lessons on the violin to B's child, intending to give the child a course of twenty lessons, and to charge B the price. B never requested A to give this instruction but plainly allows the lessons to be continued to their end, having good reason to know A's intention. B is bound to pay the price of the course."

In 1 Williston on Contracts, Section 36, the principle is stated in this manner:

> "Even though no request is made for the performance of work or service, if it is known that it is being rendered with the expectation of pay, the person benefited is liable."

> See also 1 Williston on Contracts, Sections 36 A, 91 and 91 A.

Section 36 A makes it clear that the principle applies to the sale of goods as well as the rendering of services. It is said therein:

> "A seller may make an offer of goods which is accepted by taking them with knowledge that payment is expected."

The decisions fully support the principles set forth in the Restatement and Williston on Contracts.

(1) *Western Asphalt Co. v. Valle,* 25 Wash. 2d. 428, 171 P. 2d. 159. The defendant desired to bid on a gov-

ernment contract but had no figures with respect to the cost of asphalt paving, a substantial item. Knowing that the plaintiff had done considerable asphalt paving, the defendant asked the plaintiff for its figures for that work. The plaintiff had previously computed its bid from the same specifications, and distributed it to a number of other contractors who were bidding for the prime contract, in the hope that the plaintiff would be awarded a subcontract. The plaintiff, accordingly, gave its bid to the defendant, and the latter used it in completing his bid on the prime contract. The defendant was awarded that contract but did not give the plaintiff the subcontract. The plaintiff in this action sought to recover from the defendant the amount of profit which the plaintiff would have made if it had been awarded the subcontract. The defendant contended that by not bringing action against the other contractors to whom the plaintiff submitted its figures, the plaintiff indicated that it did not expect compensation from the defendant when it gave its figure to him. The jury returned a verdict for the defendant but the trial court granted a new trial. This ruling was affirmed on appeal on the ground that the evidence created a question of fact on the issue whether the defendant, as a reasonable man, should have understood that the plaintiff expected compensation if the defendant was awarded the prime contract.

(2) *Roberts v. Gerlinger,* 124 Or. 461, 263 P. 916. That was a suit for foreclosure of a mechanics' lien. The plaintiff and the defendant had previously discussed the digging of an oil well on the defendant's land, and there-

after the plaintiff proceeded to carry out the project. The defendant knew the well was being dug but did not object and did not claim that the plaintiff was not employed to do so until some time after the well was finished. A judgment for the defendant was reversed on appeal. The court held that the plaintiff was entitled to recover, saying:

> "Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the person for whom the service is performed expresses no dissent or avails himself of the service, a promise to pay the reasonable value of the services is implied."

(3) *Vaught v. Charleston National Bank,* 62 Fed. 2d. 817, (C.C.A. 10). The president of a corporation served as such without salary. He performed many valuable services for the corporation, however, in addition to those customarily performed by a president serving without salary. The court held that he was entitled to reasonable compensation for such additional services, and allowed his claim in receivership proceedings. The court said that it could not reasonably be expected that the president, a lawyer, would devote a considerable part of his time in traveling from city to city, to refinance the corporation, without reasonable compensation.

In the following decisions the courts applied the same principle:

Hooper v. O. M. Corwin Co., 199 Wis. 139, 225 N.W. 822.
Collins v. Lewis, 111 Conn. 299, 149 Atl. 668.
Miller v. Stevens, 224 Mich. 626, 195 N.W. 481.
Callan v. Andrews, 48 F. 2d. 118 (C.C.A. 2).

Houston v. Monumental Radio, 158 Md. 292, 148 Atl. 536.
Hendryx v. Turner, 109 Wash. 672, 187 P. 372.

In the Hendryx case the court said that the law will imply an agreement to pay what the services are reasonably worth where there is no express agreement with respect to compensation.

It is true that there can be no implied in fact contract if the acts or expressed intentions of the parties are inconsistent with such a contract.

Houston v. Monumental Radio, supra.

In Macri Company's brief, page 44, it is suggested that there can be no implied in fact agreement on the part of Macri Company to pay Schaefer's costs or any part of them, for the reason that the expressed intentions of these parties are inconsistent with such an implied agreement.

Counsel quoted from that portion of the opinion, page 44, in which the court said he could not find that there was a meeting of the minds or an express contract that Mr. Schaefer was to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid the reasonable value of all his costs. The basis for this finding by the court was simply that Mr. Schaefer refused specifically to take over the fine grading and excavating when Mr. Macri offered to turn it over to him. The court added that Mr. Schaefer continued to complain, which he did, and stated that it is hard to conceive

how Mr. Schaefer would have had cause for complaint if he was to get paid for everything anyway. The court concluded by saying that Mr. Schaefer's conduct was not consistent with a meeting of the minds and an express contract that Mr. Macri was to pay Mr. Schaefer for the fair value of his services.

There are two very clear reasons why this finding of the court is not inconsistent with an implied in fact agreement that Macri Company was to pay Schaefer the reasonable value of the labor and materials furnished by him.

First, a finding that there was no express contract or meeting of the minds that Schaefer was to perform all or a part of the fine grading, simply means that there was no bilateral contract by the terms of which Schaefer promised to do that work. A finding that there was no bilateral contract and consequently no promise by Schaefer to do the work, is clearly not inconsistent with the existence of a unilateral contract by the terms of which an agreement may be implied in fact on the part of Macri Company, to compensate Schaefer for the work which he actually performed. It is conceded that Schaefer did not expressly agree to do any fine grading, but that does not mean that if, through necessity, he was compelled to do some fine grading in order to get the job done, he should not be compensated for it on the basis of a unilateral contract implied in fact.

Second, the refusal of Mr. Schaefer to undertake the fine grading was in answer to Mr. Macri's request that Mr. Schaefer take over all the fine grading and

excavating, not simply that he take over the fine grading required by reason of the defective condition of the excavations.

The court said that it was hard to understand why Schaefer should have cause for complaint if he was to be paid for all of his costs in any event. We respectfully wish to point out that it is not difficult to see how Mr. Schaefer had a cause for complaint. Macri Company's failure to perform their obligations under the subcontract led to delays and extended the performance of Schaefer's obligations from a normal period of between three and a half and four months to more than a year. This naturally added to Schaefer's costs as it required him to keep highly paid supervisors on this job for a period several times longer than was really necessary. Furthermore, it was the excessive costs which were forced upon Schaefer by Macri Company, willfully and negligently, which led to this lawsuit. If Macri Company had performed its obligations as it was bound to do by its own contract this would never have occurred.

In any event, whether the trial court was justified in making that remark or not, there is absolutely nothing in his findings which is inconsistent with the implied in fact contract relied upon by Schaefer. He was compelled to do the extra work in order that he might perform his own obligations under the subcontract, Macri Company stood by and watched him do it, accepted the work without protest, in fact urged him to go ahead and do the extra work, and received full benefit for the work done by being paid by the United States Government.

It is respectfully contended on behalf of Schaefer that a decision declaring that there was no implied in fact contract to compensate Schaefer for the extra work done by him, under these circumstances, would not only be an injustice to him, but would be contrary to all the authorities which have been discussed herein.

It is important to observe that the trial court in his opinion, quoted in Macri Company's brief, pages 44 and 45, does not deny the existence of an implied in fact contract. Actually, the court said:

> "In other words, it is the view of the court that there was an implied contract, or perhaps it would be more accurate to say a quasi contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach."

Of course, there is a difference between an implied in fact contract and one implied in law or a quasi contract, but the court does not state with certainty which he found to exist. Plainly, therefore, he did not deny the existence of the implied in fact contract relied upon by Schaefer.

The cases cited by counsel for Macri Company in their argument with respect to this subject, pages 44 and 45, are of no value whatever in support of a contention that there is no implied in fact agreement in this case.

Western Asphalt Co. v. Valle, 25 Wash. 2d. 428, 171 P. 2d. 159, already discussed herein, is of course one of

the most important cases supporting the contention of Schaefer with respect to this question. The opinion plainly declares that an agreement of the character relied upon by Schaefer should be implied in fact from the circumstances of this case.

Chandler v. Washington Toll Bridge Authority, 17 Wash. 2d. 591, 137 P. 2d. 97, is of no greater benefit to Macri Company. The plaintiff in that case never did any work for the defendant or with its knowledge, and never entered into a contract with it. The court held in affirming a judgment entered in favor of the defendant as a matter of law, that the plaintiff was not entitled to recover against the defendant in quasi contract. The court expressly stated that the plaintiff "does not rely upon any contract implied in fact."

The remaining cases are equally inappropriate and do not merit discussion.

It is contended in Macri Company's brief, page 63, that Schaefer is not entitled to any recovery for extra work done by him for the reason that there was no compliance with the terms of the subcontract relating to the ordering of extras. It is said that the subcontract required Macri Company to determine in advance the amount to be allowed for such extras and to order the extra work in writing, specifying the prices to be paid.

It is respectfully submitted on behalf of Schaefer that the lack of compliance with the subcontract in these respects, is no defense to this action, for three reasons:

1. Section 3 of Article Three of the subcontract,

quoted in part in Macri Company's brief, page 9, does not apply to this case for the reason that the words, "any such alteration or deduction," in that quotation, refer to "alterations in or deductions from the plans and specifications" which are made by the owner or principal contractor pursuant to authority granted in the first paragraph of that section which is not quoted in Macri Company's brief. Here, no change was made by the owner or principal contractor in either the plans or specifications, of the sort contemplated by the first paragraph of Section 3 of Article Three. Instead, Macri Company failed to perform the obligations imposed upon them by the subcontract, and the extra work became necessary in order that Schaefer might carry out his own obligations.

2. Compliance with such formalities was waived by Macri Company by ignoring them at all times while accepting Schaefer's performance of the extra work.

The trial court expressly stated in his opinion that Mr. Macri "waived any and all requirements as to written notice contained in the contract, by his conduct (Tr. 2213)." This conclusion is amply supported by the evidence and the decisions. When Mr. Macri orally promised to pay the extra costs and expenses, he demonstrated considerable impatience, indicating that no further formalities would be observed by him and that none need be requested by Schaefer. His main thought was evidently to get the project in operation again. His words were, "I'll pay you for all the extras, just get going (Tr. 226)," and, "You're not going to have to wait

for anything any more. You just get back here and get going (Tr. 287)."

In *Ross Engineering Co. v. Pace,* 153 Fed. 2d. 35 (C.C.A. 4), the court held that the lack of written orders from the general contractor, although required by the contract, did not preclude the subcontractor from securing a judgment against the general contractor, where from the beginning these parties ignored the provisions in the subcontract with respect to written orders when additional work was requested.

3. Macri Company is estopped to assert now that there was no compliance with the formalities of the subcontract.

This contention is based upon the facts and principles of law set forth under heading II in this brief. These facts need not be repeated. It should be emphasized, however, that during the conversations at the job site between Mr. Schaefer and Mr. Macri, when the latter promised "to do better" and to pay Schaefer's costs, he also said that nobody had lost any money on his jobs and that nobody would lose on this one (Tr. 224, 286). Mr. Schaefer had a right to, and undoubtedly did, rely upon these words of Mr. Macri. From this statement and his promises to pay Schaefer's costs, it may be inferred that Mr. Macri promised Mr. Schaefer that he, Mr. Macri, would pay Schaefer's costs and expenses and that no defense would ever be raised that there was no compliance with the formalities required by the subcontract.

That is exactly what the court held in *Albachten v.*

Bradley, 212 Minn. 359, 3 N.W. 2d. 783, which was discussed at some length under heading II. It will be recalled that the plaintiff in that case was pressing the defendant for payment of a note. The defendant asked the plaintiff to wait until a specified date after an action on the note would be barred by the statute of limitations. To induce the plaintiff to grant this delay, the defendant said to him, "You won't have to start an action to collect. You will not lose anything by waiting." The court said that the assurance that the plaintiff would not lose anything by waiting was, in effect, an agreement that the statute of limitations would not be asserted as a defense by the defendant. The court held that the defendant was estopped to rely upon the statute.

It will be recalled that cases discussed under heading II establish that where the elements of a promissory estoppel exist, based upon an oral promise, the mere fact that the promise is oral does not prevent the application of the doctrine, although the Statute of Frauds may require that sort of promise be in writing.

Lacy v. Wozencraft, 188 Okla. 19, 105 P. 2d. 781.
Sessions v. Southern California Edison Company, 47 Cal. App. 2d. 611, 118 P. 2d. 935.

It is likewise no answer that a rule of law independent of statute, requires a promise of that character to be in writing.

Alameda County Title Ins. Co. v. Panella, 218 Cal. 510, 24 P. 2d. 163.
Panno v. Russo, ... Cal. App. 2d. . ., 186 P. 2d. 452.

It is respectfully contended, therefore, that an enforceable, implied in fact contract came into being as a result of Schaefer's performance of the extra work, by the terms of which Macri Company promised to pay him the reasonable value of the labor and materials furnished by him in the performance of such extra work, and, in addition, reasonable overhead and profit.

Under heading I it was shown that Schaefer is entitled to disregard that contract and recover in quantum meruit the reasonable value of such labor and materials and overhead and profit, inasmuch as Macri Company's failure to pay for such labor and materials constituted a total breach of the implied in fact contract, Schaefer's claim being unliquidated. Schaefer can, of course, recover damages for breach of the implied in fact contract, but he prefers to rely upon his right to recover in quantum meruit because of the nature of this action.

The correct amount of Schaefer's recovery is determined under heading V.

IV.

THERE IS SUBSTANTIAL EVIDENCE IN SUPPORT OF THE FINDINGS OF THE TRIAL COURT THAT MACRI COMPANY BREACHED THE SUBCONTRACT, AND THESE FINDINGS SHOULD THEREFORE BE SUSTAINED.

Rule 52 (a) of the Rules of Civil Procedure declares that in all actions tried upon the facts without a jury,

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This court has frequently stated and applied this Rule.

Hartford Accident & Indemnity Co. v. Jasper, 144 Fed. 2d. 266 (C.C.A. 9)
Wingate v. Bercut, 146 Fed. 2d. 725 (C.C.A. 9)

It has been held many times that findings of fact supported by substantial evidence may not be disturbed on appeal.

U.S. Guarantee Co. v. Colonial Oil Co., 145 Fed. 2d 496 (C.C.A. 5).
Andrew Jergens Co. v. Conner, 125 Fed. 2d 686 (C.C.A. 6).
Plack v. Baumer, 121 Fed. 2d 676, (C.C.A. 3).

An extended discussion is not necessary to establish that there is substantial evidence in support of the findings of the trial court that Macri Company breached the subcontract. The court is simply referred to the Statement of Case in this brief.

Evidence establishing the correct amount of Schaefer's recovery is analyzed under heading V of this brief, and need not be considered here.

It is respectfully submitted that there is ample evidence to support the trial court's findings with repect to Schaefer's right to recover and the amount which should be awarded to him. These findings are therefore not clearly erroneous, and should be sustained.

V.

THE EVIDENCE ESTABLISHES WITH REASONABLE CERTAINTY THE AMOUNT WHICH SCHAEFER IS ENTITLED TO RECOVER

It has already been shown in the argument under headings I, II and III that Schaefer should be allowed to recover on three separate theories. These will now be considered separately to demonstrate that the amount of the judgment can be sustained on each.

I.

Recovery in quantum meruit of all Schaefer's costs and expenses, together with overhead and profit, based upon Macri Company's wilful and continuing breaches of the subcontract.

The trial court stated in his findings of fact that the value of the labor and materials furnished and services rendered for which Macri Company was chargeable, was as shown in Exhibit 63, the audit prepared by a certified public accountant at Schaefer's request; and the court allowed all the items set forth therein with the exception of interest and two other minor items (Tr. 103, 104). Counsel for Macri Company have not attacked the accuracy of this audit nor have they contended that it does not truly show Schaefer's actual costs and expenses. They do insist that Schaefer should not be permitted to recover overhead and profit, but that contention has been answered under heading I.

There is substantial evidence establishing the items

of overhead and profit. The accountant who prepared Exhibit 63 testified that he fixed overhead at 20% of the total direct costs because the true percentage, which he ordinarily used, was too high for a business of this kind (Tr. 1239, 1251, 1259, 1269). This was undoubtedly due to Schaefer's experience on this project. The accountant then stated that he computed the profit at 10% of the total of the direct costs and overhead, as most cost plus jobs in the construction field are figured on that basis. He added that it had been Schaefer's practice to bill on that basis, and to include overhead in his cost (Tr. 1272, 1273).

It cannot be seriously contended, therefore, that Schaefer has not met the burden of proof with respect to the measure of his recovery on the theory set forth under heading I.

It is respectfully submitted, therefore, that Schaefer's recovery should be computed as follows, if this theory is adopted.

(a) Schaefer's total direct costs allowed by the court	$67,712.84
(b) Overhead — 20% of (a)	13,542.57
(c) Schaefer's total costs — (a) plus (b)	81,255.41
(d) Ten per cent profit	8,125.54
(e) Total costs, overhead and profit — (c) plus (d)	89,380.95
(f) Amount paid by Macri Company	32,614.66
(g) Total amount due and unpaid — (e) minus (f)	$56,766.29

This figure varies slightly from the amount of the judgment due to an error in calculation at the conclusion of the trial.

II.

Recovery based on the principle that an injustice can be avoided only by enforcement of Macri Company's promises to pay Schaefer's costs, and Macri Company are estopped to assert that their promises are not binding upon them.

As previously pointed out, it is not entirely clear whether Mr. Macri promised Mr. Schaefer to pay all of Schaefer's costs, or only his extra costs due to Macri Company's breaches of the subcontract. Even the opinion of the court and his findings of fact do not indicate with certainty which view he adopted. In fact, he may have adopted neither, but permitted a recovery in quasi contract instead, inasmuch as he allowed all of Schaefer's costs and expenses together with overhead and profit, less what he received.

If, under this theory, Schaefer is entitled to recover all of his costs and expenses together with overhead and profit, it is clear that the judgment should be affirmed, for the reasons stated in the previous subdivision.

If, on the other hand, Schaefer is entitled to a judgment for the amount specified in the subcontract, less what he received, and in addition thereto his extra costs and expenses, there is ample testimony in this record to support the judgment. The following discussion deals

only with the latter recovery, i. e., for the additional costs and expenses, and the corresponding overhead and profit.

It is contended on behalf of Macri Company that Schaefer failed to keep a separate account of his increased costs and that he failed to introduce any evidence of their extent at the trial. It is further contended that Schaefer, not having met the burden of proof, is entitled to recover nothing, inasmuch as the evidence shows Macri Company has already paid Schaefer almost all he would have been entitled to receive if the subcontract had been faithfully performed by Macri Company.

There are two answers to these contentions, although it is conceded that Schaefer did not keep a separate account of his extra costs.

In the first place, the breach of contract by Macri Company was willful and negligent and was of such character as to render precise computations of extra costs economically and physically impossible.

The extra work done by Schaefer consisted in the following:

(1) Fine grading the excavations to the proper level; (2) removing earth from the walls of the excavations to give them more slope and permit the forms to be inserted properly; (3) removing earth or cribbing and back-filling, where the walls were not properly excavated to the neat concrete line; (4) removing from excavations, panels assembled into structures, when it appeared that

the excavations had not been dug to the proper grade, and reassembling such panels in the excavations after additional fine grading; (5) removing the forms under adverse conditions after the concrete had set; (6) taking the forms back to the yard in order that they might be rebuilt, and returning them to the next excavation; (7) rebuilding panels to a different size because of a lack of lumber and the vertical walls of the excavations; (8) additional use of trucks; (9) additional use of other equipment; (10) additional supervision, that is, a superintendent and foreman were required for a much longer period than would have been necessary under normal conditions; (11) time lost in delay caused by Macri Company.

It is evident that from the nature of the operation and the extra work done, it would have been economically, and in many instances physically impossible to have kept an exact account of all these extra costs. Mr. M. C. Schaefer testified that in connection with the extra trips required to haul the forms from the excavation back to the yard and then on to the next excavation, it was a physical impossibility to establish a dividing line between what was contract and what was additional work (Tr. p. 1368).

In the second place, Schaefer did produce very substantial evidence of additional costs, and it is respectfully submitted that such evidence fully meets the requirements established by the Supreme Court of the United States which will be discussed.

This evidence consisted in the testimony of several

witness and Exhibits 51 and 63. Exhibit 51 shows the estimated time of performance of all aspects of his work: Constructing forms, pouring concrete, and stripping the forms. It also shows the daily progress of the work by means of cumulative percentages of the total to be done in each of these three categories. It also indicates exactly how many men were employed each day and in what work they were primarily engaged. Exhibit 63 is the audit prepared by the certified public accountant at Schaefer's request, setting forth all of his costs and expenses itemized by months.

Mr. L. E. Bufton, an engineer of uncommon experience in the field of concrete construction (Tr. 1133 to 1139), testified that after examining the specifications covering this job, the work required of Schaefer under the subcontract could have been performed by him, if Macri Company had performed their obligations under the subcontract, in not more than four months (Tr. 1160, 1161, 1162). He added that to accomplish this in four months, he would need an average of 25 men per day (Tr. 1216), which means, assuming 25 working days in each month, 2500 men days would have been required.

By means of a hypothetical question setting forth the principal details of the conditions under which Schaefer was compelled to do his work, Mr. Bufton was asked how and to what extent the conditions mentioned would affect the reasonable cost and value of the performance by Schaefer (Tr. 1167, 1168, 1169). His answer was that he could not state the additional

costs in dollars and cents but that he felt that the cost might be from two to three times as much as it should have been under normal conditions (Tr. 1172 to 1175).

Finally, Mr. Bufton said that he figured the reasonable cost and value of the performance of the work undertaken by Schaefer, assuming that Maori Company performed their obligations as required by the subcontract, would be $27.88 per cubic yard. He added this figure included an allowance for the services of the subcontractor himself and overhead. By overhead he said he meant home office and general supervision (Tr. 1162, 1163, 1164). Mr. Bufton also referred to a similar project in Oregon. He said the subcontractor carrying out the concrete work had bid $30.00 per cubic yard with the understanding that he furnish all the lumber for forms (Tr. 1141, 1142, 1143). Mr. Schaefer testified that his bid of $26.00 per cubic yard would have been raised to $30.00 if he had been required to furnish the lumber (Tr. 419). Thus their bids were in the same amount.

Mr. Darcy testified that if the excavations had been ready with the banks on a one to one slope and a lateral clearance of one foot at the foundation of the structure, and lumber had been furnished of proper quality and on time, no more than three and a half months at the very outside would have been necessary to complete the job (Tr. 464). Actually a year and three weeks were required.

Exhibit 51 established beyond contradiction that

this job could have been completed within three and a half months or at least within the four months specified by Mr. Bufton, if Macri Company had faithfully performed the subcontract. That exhibit shows the following actual performance by Schaefer during the periods indicated:

Form setting, from Feb. 9, 1945 to Mar. 8, 1945, the most productive month — 17½ per cent of the entire job.

Pouring concrete, from Mar. 1, 1945 to Mar. 30, 1945, the final 30 days — 30 per cent of the entire job.

Stripping forms, from Mar. 5, 1945 to Apr. 4, 1945, the final month — 39 per cent of the entire job.

These figures demonstrate that so far as pouring concrete and then stripping the forms was concerned, operations in which Schaefer was not directly dependent on Macri Company, Schaefer could have performed all of the work contemplated by the subcontract in 100 days of elapsed time. During no month was he able to construct in the excavations more than 17½ per cent of the entire number of forms required on this project, but it appears from Exhibit 51 that in seven days of actual time and eight days of elapsed time, from January 19, 1945 to January 26th, Schaefer's men were able to set 6½ per cent of the entire number of forms, and that on each of sixteen other days, widely scattered, they set one per cent or more of the total number.

Exhibit 51 establishes by means of the following

computation that Schaefer actually demonstrated the capacity to complete the work in the same or less time and with less men than Mr. Bufton estimated:

Form setting (including yard, form setting, field repair, and trucking crews) — 6½% of the work required 107 men days
Concrete pouring — 30% of the work required 176 men days
Form stripping — 30% of the work required 34 men days
All types of work — 100% would require 2,346 men days

One other fact is worthy of mention: The ratio of Schaefer's demonstrated performance of 2346 men days to Mr. Bufton's estimated performance of 2500, is 94/100. The ratio of Schaefer's bid per cubic yard of $26.00 to Mr. Bufton's estimate of $27.88, is 93/100. The significance of this fact is that it establishes that Schaefer's bid may properly be used as a basis for a computation of the amount for which the work could have been done.

Schaefer's extra costs may be determined with reasonable certainty from the testimony and exhibits just considered, by two separate computations:

1. Based on the difference between Schaefer's actual, total costs and his estimated costs.

(a) Schaefer's bid, per cubic yard	$	26.00
(b) Schaefer's estimated costs, eliminating 10% profit but not overhead — 10/11 of (a)		23.64
(c) Number of yards poured for which compensation was paid		

to Macri Company — Exhibit 14 (Tr. 160)	1,356.697
(d) Schaefer's estimated costs, including overhead but not profit — (b) multiplied by (c)	32,072.32
(e) Schaefer's total, actual costs including 20% overhead — (c) of table in previous subdivision	81,255.41
(f) Schaefer's extra costs including 20% overhead — (e) minus (d)	49,183.09
(g) Ten per cent profit	4,918.31
(h) Total extra costs and profit — (f) plus (g)	$54,101.40

To this should be added, of course, the amount which remains unpaid under the subcontract.

(i) Amount required by the subcontract to be paid — (a) multiplied by (c)	$35,274.12
(j) Amount paid by Macri Company	32,614.66
(k) Balance remaining unpaid — (i) minus (j)	2,659.46
(l) Total amount due and unpaid on this basis — (h) plus (k)	$56,760.86

It will be observed that this is $4.11 less than the amount of the judgment.

2. Based on Mr. Bufton's estimate that the total cost might be from two to three times as much as it should have been under normal conditions.

A figure of two and one half was adopted in making

this computation which means that the extra costs are assumed to be one and one half times the costs under normal condition.

(a) Schaefer's estimated costs, including 20% overhead but not profit — (d) of previous table	$32,072.32
(b) Total costs based on Mr. Bufton's estimate of rate of increase, but Schaefer's estimate of costs, including 20% overhead — (a) multiplied by 1½	48,108.48
(c) Ten per cent profit	4,810.85
(d) Total extra costs and profit — (b) plus (c)	52,919.33
(e) Balance remaining unpaid on subcontract — (k) of previous table	2,659.46
(f) Total amount due and unpaid on this basis — (d) plus (e)	$55,578.79

This is $1,186.18 less than the amount of the judgment, but it would be substantially increased by using Mr. Bufton's estimated cost of $27.88 per cubic yard, or adopting his estimated increase of three times the cost under normal conditions.

It is respectfully submitted that the evidence, as thus analyzed, fulfills the requirements of the Supreme Court with respect to the character of proof required to sustain a money judgment.

(1) *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 90 L.Ed. 1515, 66 S. Ct. 1187. That was an action for overtime compensation under the Fair Labor Standards Act. The Circuit Court of Appeals reversed a

judgment entered in favor of the plaintiff in the District Court, for the reason that the evidence of the extent of his overtime work was conjectural. The Supreme Court reversed the Circuit Court of Appeals and affirmed the judgment of the District Court, saying:

> "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of Section 11 (c) of the Act. And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.' Story Parchment Co. v Paterson Parchment Co., 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages. Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S 359, 377-379, 47 S.Ct. 400, 405, 71 L.Ed. 684; Palmer v Connecticut Railway & Lighting Co., 311 U.S. 544, 560, 561, 61 S.Ct. 379, 384, 385, 85 L.Ed. 336; Bigelow v. RKO Radio

Pictures, Inc. 327 U.S. 251, 263-266, 66 S.Ct. 574, 579, 580."

(2) *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 90 L.Ed. 652, 66 S.Ct. 574. This was an action under the Sherman and Clayton Acts for an injunction and to recover treble damages. The Supreme Court affirmed the judgment for the plaintiffs entered in the District Court, although the evidence of damages sustained by the plaintiffs consisted simply in a comparison of the plaintiff's receipts before and after the defendant's wrongful acts. In reversing the Circuit Court of Appeals for the Sixth Circuit, the court said:

"In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof.' Story Parchment Co. v. Paterson Parchment Paper Co., supra, 282 U.S. 561-564, 51 S.Ct. 250, 251, 75 L.Ed. 544; Eastman Kodak Co. v. Southern Photo Materials Co., supra, 273 U.S. 377-379, 47 S.Ct. 404, 405, 71 L.Ed. 684. Any other rule would enable the wrongdoer to profiit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.

"Failure to apply it would mean that the more grevious the wrong done, the less liklihood there would be of a recovery.

"The most elementary conceptions of justice and

public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See Package Closure Corp. v. Sealright Co., 2 Cir., 141 F. 2d 972, 979. That principle is an ancient one, Armory v. Delamirie, 1 Strange 505, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. * * *

" 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights. Story Parchment Co. v. Paterson Parchment Paper Co., supra, 282 U.S. 565, 51 S.Ct. 251, 75 L.Ed. 544; and see also Palmer v. Connecticut Railway Co., 311 U.S. 544, 559, 61 S.Ct. 379, 384 85 L.Ed. 336, and cases cited.

"The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondent's action, whose unlawfulness the jury has found, and respondents do not challenge. The comparison of petitioners' receipts before and after respondent's unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage, where the respondent's wrongful action had prevented petitioners from making any more precise proof of the amount of the damage."

It is respectfully submitted, therefore, that if this theory is adopted, the judgment should be affirmed.

III.

Recovery based on the implied in fact agreement of Macri Company to pay Schaefer's costs.

It is probable that the implied in fact agreement is

limited to an undertaking by Macri Company to pay all of Schaefer's additional costs and expenses. Inasmuch as his claim was unliquidated, he has a right to recover in quantum meruit or by specific performance of the agreement. In either event his recovery is the same, and the evidence amply justifies the affirmance of the judgment, as was pointed out fully in the discussion under the previous subdivision.

VI.

SCHAEFER IS ENTITLED TO A DECISION THAT HE HAD CAPACITY TO SUE IN THE DISTRICT COURT

Counsel for Macri Company contended at the trial and now assert on this appeal that Schaefer is not entitled to maintain this action for the reason that Schaefer failed to file the assumed name certificate required by Remington's Revised Statutes of the State of Washington, Section 9976, prior to the trial. It is said that this failure on his part precludes him from maintaining this action, by reason of the provisions of Section 9980 quoted in Macri Company's brief, page 59.

This contention has no merit whatever. Rule 17(b) of the Rules of Civil Procedure declares: "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile."

See 6 Cyclopedia of Federal Procedure 147, Section 2099.

Schaefer resided and was domiciled in Portland, Oregon, when this action was commenced, when the amended complaint was filed and at the time of the trial. He also maintained his office in that City and State (Tr. 3, 178, 181).

The controlling question, therefore, is whether the law of Oregon has given Schaefer capacity to sue. The statutory requirements of Washington have no effect whatever upon its determination.

Counsel for Macri Company have never asserted that Schaefer has no capacity to sue because of his failure to meet any requirement of the Oregon law. By failing to make such contention either by motion or in their answer, Macri Company have waived the right to assert it.

Rule 9(a) of the Rules of Civil Procedure states:

> "It is not necessary to aver the capacity of a party to sue * * * except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to * * * the capacity of any party to sue * * * he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

Schaefer complied with the requirement of the first sentence of Rule 9(a). The amended complaint contains sufficient averments to show the jurisdiction of the court in that it alleges every fact upon which the jurisdiction of the District Court depends under the Miller Act, and alleges a cause of action in favor of Schaefer under that act.

On the other hand, counsel for Macri Company have failed to comply with the requirement of the second sentence of Rule 9(a) in that they have never contended in a motion or in their answer that the law of Schaefer's domicile, the State of Oregon, has not conferred upon him the capacity to sue in the District Court.

All defendants had knowledge that M. C. Schaefer was an individual doing business as the Concrete Construction Company, that he was the sole owner of such business, and that he was a resident of the State of Oregon, inasmuch as these facts were alleged in paragraph II of his amended complaint, filed January 24, 1946 (Tr. p. 3). Actually, Macri Company admitted that allegation in their answer (Tr. p. 13), without questioning Schaefer's capacity to sue.

It is established that under these circumstances, counsel for Macri Company have waived the right to question the capacity of Schaefer to maintain this action.

Trounstine v. Bauer, Pogue & Co., Inc., 144 Fed. 2d. 379 (C.C.A. 2), cert. den. 323 U.S. 777.
Kucharski v. Pope & Talbot, Inc., 4 Fed. R. Dec. 208 (D. Ct. N.Y.).
Chemacid v. Ferrotar Corp., 3 Fed. R. Dec. 45, (D. Ct. N.Y.).

It was held in *Kucharski v. Pope & Talbot, Inc.*, supra, that the defendant waived its right to object to the capacity of the plaintiff to sue, by failing to raise the question until after the statute of limitations had run against the plaintiff's claim. In the present case, the Miller Act itself, 40 U.S.C.A. Section 270 b, imposes a

limitation on actions brought under its provisions, of one year after the date of final settlement of the prime contract. The bar of the statute was complete, therefore, on March 31, 1946 (Tr. p. 104), approximately one year before the trial of this case was commenced.

This strengthens the conclusion that counsel for Macri Company have waived the right to raise this question.

It appears advisable, however, to state to this court what took place at the trial. At the beginning of his testimony on the first day of the trial, Mr. M. C. Schaefer admitted that he had not filed an assumed name certificate in Yakima, Washington. Opposing counsel then raised their first objections to Schaefer's capacity to sue, based upon Schaefer's failure to comply with the Washington statute. Three days later such a certificate was filed on his behalf, in Yakima County, Washington, and a certified copy of it was received in evidence as Exhibit 59 before the plaintiff rested (Tr. 670, 673). In offering this exhibit, counsel for Schaefer stated that he did not concede that it was necessary to file the certificate and, in fact, that the state law was entirely inapplicable (Tr. 670). The court said that he would consider that the amended complaint and Macri Company's answer were amended to show the filing of the certificate and that its sufficiency was questioned. There is nothing in the record indicating that either Macri Company or the Continental Casualty Company were mislead or prejudiced in any way in their business dealings with Schaefer or in this litigation by reason of his failure to

file the assumed name certificate prior to trial.

It is respectfully contended, therefore, that Schaefer is entitled to a decision that he had capacity to sue in the District Court.

VII.

SCHAEFER IS ENTITLED TO RECOVER FROM MACRI COMPANY AND CONTINENTAL CASUALTY COMPANY THE AMOUNT OF HIS CLAIM, UNDER THE MILLER ACT

The basis for this contention is that it has already been demonstrated under the previous headings of this brief that Schaefer has a right to recover from Macri Company either the full amount of his costs and expenses, together with overhead and profit, less what he has already received, or the amount of his extra costs and expenses, together with overhead and profit, plus the sum remaining unpaid on the subcontract.

It is established beyond doubt that if, under the law of contracts, a subcontractor has a right to a judgment against the general contractor by reason of having furnished labor or materials in the prosecution of the work provided for in the prime contract for the construction of a public work of the United States, he, the subcontractor, is entitled to a judgment likewise against the surety on the payment bond of the general contractor, by reason of the terms of the Miller Act, 40 U.S.C.A., Section 270 a to 270 d.

In each of the following six cases it was held that the subcontractor was entitled to a judgment against the surety under the Miller Act for the reason that, under the law of contracts, the subcontractor had a right to recover from the general contractor.

(1) *United States v. Zara Contracting Co.,* 146 Fed. 2d. 606 (C.C.A. 2). In that case the court allowed a recovery against both in quantum meruit in reliance upon the general law of contracts.

(2) *United States v. John A. Johnson Contracting Corp.,* 139 Fed. 2d. 274, Cert. Den. 321 U.S. 797 (C.C.A. 3). The court allowed a recovery based upon the general law of contracts, in reliance upon the Restatement, Williston on Contracts and a number of decisions.

(3) *Great Lakes Construction Co. v. Republic Creasoting Co.,* 139 Fed. 2d. 456 (C.C.A. 8). The court permitted a recovery in quantum meruit following a breach on the part of the general contractor.

(4) *Lange v. United States,* 120 Fed. 2d. 886 (C.C.A. 4). The court applied the law of contracts of Maryland and decided that a promise of the general contractor was supported by adequate consideration.

(5) *United States v. Standard Accident Ins. Co.,* 106 Fed. 2d. 200 (C.C.A. 7). In that case the court allowed a recovery of a sum considerably in excess of the amount specified in the subcontract, for the reason that the subcontractor and the general contractor entered into a binding contract by which the latter agreed

to pay a greater sum than that specified in the subcontract.

(6) *Royal Indemnity Co. v. Woodbury Granite Co.,* 101 Fed. 2d. 689 (Ct. App. D.C.). The court held that the surety of the general contractor is liable whenever the general contractor himself is liable.

It has been repeatedly held that a recovery may be allowed under the Miller Act against both the general contractor and his surety, for labor or materials furnished under orders or requests by the general contractor in modification of the subcontract.

(1) *Dow v. United States,* 154 Fed. 2d. 707 (C.C.A. 10). The subcontract provided that the banks of excavations should be vertical and that the subcontractor should perform his work as directed by the general contractor. The latter directed the subcontractor to cut the banks on a one to one slope and the subcontractor complied. The court held that the subcontractor was entitled to recover for the extra work done by him in cutting the banks on a slope.

(2) *Ross Engineering Co. v. Pace,* 153 Fed. 2d. 35 (C.C.A. 4). A recovery was allowed in that case for extras ordered orally by the general contractor, in spite of a provision in the subcontract that extra work should be ordered in writing.

(3) *United States v. Standard Accident Insurance Co., supra,* 106 Fed. 2d. 200 (C.C.A. 7). The court enforced an express agreement to pay for extra work done by the subcontractor.

(4) *United States v. Otis Williams & Co.,* 30 Fed. Sup. 590 (D. Ct. Ida.). The plaintiff was permitted to recover for extra work required by changes made by the government.

(5) *United States v. Mathew Cummings Co.,* 27 Fed. Sup. 405 (D.Ct. Mass.) The plaintiff recovered for extra work orally ordered by the general contractor, in spite of a term in the subcontract which declared that no charges for extras would be allowed unless ordered in writing.

In conformity to the principle that if a subcontractor is entitled to a judment against the general contractor under the law of contracts, he has a right to a judgment against the surety, it has been held that there need not be a bilateral contract between the subcontractor and the general contractor to justify a recovery against the latter and his surety, and that a unilateral contract is a sufficient basis for a recovery against both.

(1) *United States v. John A. Johnson Contracting Corp.,, supra,* 139 Fed. 2d. 274, Cert. Den. 321 U.S. 797 (C.C.A. 3). The court said that the judgment entered in favor of the subcontractor in the trial court could be sustained on either of two grounds: (a) The subcontractor's performance of the work created a unilateral contract. (b) His performance amounted to an acceptance of the general contractor's offer, thus creating a bilateral contract.

(2) *United States v. American Surety Co.,* 200 U.S. 197, 50 L. Ed. 437, 26 S. Ct. 168. This case clearly

establishes that it is immaterial under what sore of arrangement the labor or materials are furnished, a view which is plainly supported by the statute itself, 40 U.S.C.A., Section 270 b. The plaintiff in that case performed services for a subcontractor and not for the general contractor. The court held that the labor and materials thus furnished were within the obligation of the surety, saying:

> "The obligation is 'to make full payments to all persons supplying it (the general contractor) with labor or materials in the prosecution of the work provided for in said contract.' This language, read in the light of the statute looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied."

As already pointed out in the argument under the previous headings and in the previous discussion under this heading, a term in a contract that extra compensation will not be allowed unless the work is ordered in writing, does not prevent the recovery of the reasonable value of such extra work or the contract price for it, from the general contractor and his surety.

(1) *Ross Engineering Co. v. Pace,* supra, 153 Fed. 2d. 35 (C.C.A. 4). The court based its decision on the fact that from the beginning the parties ignored the provisions in the contract with respect to written orders, and held that such conduct amounted to a waiver of the contract requirement.

(2) *United States v. Mathew Cummings Co.,* supra, 27 Fed. Sup. 405 (D. Ct. Mass.)

There may be a recovery against the general contractor and his surety, of the contract price, where the only breach has been the failure to pay for the labor or materials.

(1) *Anderson v. United States,* 151 Fed. 2d. 945 (C.C.A. 9) Here recovery was permitted on a written agreement modifying the original contract.

(2) *Royal Indemnity Co. v. Woodbury Granite Co.,* supra, 101 Fed. 2d. 689 (Ct. App. D. C.). The court held that the surety of the general contractor is bound by the contract price in a suit by a subcontractor, except in a case of collusion, fraud or such overreaching as will shock the conscience.

There may be recovery against the general contractor and his surety in quantum meruit for the reasonable value of the labor and materials furnished, where the general contractor has been guilty of a breach of contract.

United States v. Zara Contracting Co., supra 146 F. 2d. 606 (C.C.A. 2).
Great Lakes Construction Co. v. Republic Creosoting Co., supra, 139 Fed. 2d. 456 (C.C.A. 8).

The measure of recovery in an action against the general contractor and his surety based upon the furnishing of labor or materials, is not simply the value of the benefit conferred upon the general contractor, but is the value of the labor or materials in the open market. If the market value is adopted as the measure of recovery, it is evident that such recovery shall include reasonable overhead and profit in addition to actual

expenditures, inasmuch as any one offering to furnish labor or materials in the open market will include overhead and profit in figuring the amount of his offer.

> *United States v. Zara Contracting Co.*, supra, 146 Fed. 2d. 606 (C.C.A. 2).

The court is referred to the discussion of this principle of contract law under heading I, and to the authorities there cited. The cases considered were not brought under the Miller Act, with the exception of the Zara case, but the principle is equally applicable to either sort. For reference, these authorities are cited again.

> Restatement of the Law of Contracts, Section 347 (1) (a) Comment c.
> 3 Williston on Contracts, Section 1480.
> *Sofarelli Bros. v. Elgin,* 129 Fed. 2d. 785 (C.C.A. 4).
> *Schwasnick v. Blandin,* 65 Fed. 2d. 354 (C.C.A. 2).
> *Nelson v. City of Seattle,* 180 Wash. 1, 38 P. 2d. 1034.

The only question remaining is whether Schaefer's recovery under the Miller Act may properly include all the items which were allowed by the trial court. It appears advisable to first cite the cases which declare what expenditures are proper elements of a recovery against the surety on the general contractor's payment bond.

(1) *Brogan v. National Surety Co.,* 246 U. S. 257, 62 L. Ed. 703, 38 S. Ct. 250. Groceries furnished to the general contractor to provide board for his em-

ployees, were held to be proper items for the reason that the general contractor found it necessary to furnish board. The court said that the statute must be construed liberally in favor of those who furnish labor and materials and added that it had repeatedly refused to limit the act to labor and materials directly incorporated into the public work itself. The court gave the following examples of proper items: cartage and towage of material; drawings and patterns used in making molds; labor although at a considerable distance from the construction site, including the labor of those making repairs of facilities; rental of equipment belonging to another; expenses of loading materials, and freight to the place where used.

(2) *United States v. Zara Contracting Co., supra,* 146 Fed. 2d. 606 (C.C.A. 2). Rental paid to another for use of his equipment was held to be proper.

(3) *Glassell-Taylor Co. v. Magnolia Petroleum Co.,* 153 Fed. 2d. 527 (C.C.A. 5). Expenditures for gasoline and oil used in necessary trucks were held to be recoverable.

(4) *United States v. Seabord Surety Co.,* 26 Fed. Sup. 681, affirmed 106 Fed. 2d. 355 (C.C.A. 9). The cost of workmen's compensation insurance is a proper item.

(5) *United States v. Ambursen Dam Co.,* 3 Fed. Sup. 548 (D. Ct. Cal.). Minor and incidental repairs which are made necessary by the use of machinery in the prosecution of the work, are within the obli-

gation of the bond as are steel, nuts, bolts and washers.

"Labor (Tr. 1252)," "Batching (Tr. 1256, 1297, 1328)," "Payroll insurance (Tr. 1253)," "Payroll taxes (Tr. 1254)," are all allowable as labor. Batching represents the mixing of aggregate by another company. The items of payroll insurance and taxes are allowable on the principle of necessity, as labor can not be employed without making such payments. "Truck hire (Tr. 1254, 1296)," and "Equipment rental (Tr. 1254)," are allowable as they represent sums paid for the rental of equipment belonging to others. "Small Tools (Tr. 1254)," and "Hardware (Tr. 1255)," are proper as expendable items. "Equipment repair and maintenance (Tr. 1254, 1298)," are allowable as minor repairs made necessary by the use of machinery. "Gasoline (Tr. 1255)," and "Oil (Tr. 1255)," are allowable as expendable supplies. "Form oil," "Metal pipe plugs" which were made especially for use on this job, "Hunt Process and Sealcure (Tr. 1255)," "Sisalkraft Paper," "Lumber for cement shed," and "Roofing for cement shed (Tr. 1256)," are proper as materials used in the prosecution of the work, the first four of these items being used in the actual construction of the concrete structures, and the last two being incorporated in a cement shed used by Schaefer. The remaining items should be included as necessary expenses.

Answer to Contentions of Continental Casualty Company that there is No Liability on its Bond.

Several cases bearing on the question of its liability, are cited in its brief.

United States v. Seaboard Surety Co., 26 Fed. Sup. 681 (D. Ct. Mont.). The plaintiff, a subcontractor, sought by this action to recover profits lost by it due to the delay of the general contractor. The latter was compelled to discontinue work because of insolvency. The plaintiff then refused to perform further and his surety completed the work. The court held that the plaintiff was not entitled to recover damages for loss of profits.

This case has no application to the present situation for the reason that Schaefer is not attempting to recover damages for loss of profits which he might have earned under other circumstances than those which actually existed. Schaefer is attempting to recover an item of profit in order that his total recovery may amount to the market value of the labor and materials furnished by him.

L. P. Friestedt Co. v. U. S. Fire Proofing Co., 125 Fed. 2d. 1010 (C.C.A. 10). This case is likewise inapplicable for the reason that it was an action for damages for breach of contract which is indicated in the first paragraph of the quotation in the Continental Casualty Company's brief, page 57. The opinion further indicates that the plaintiff was not attempting to recover in quantum meruit. The only decision relied upon by the court was

the Seaboard Surety Company case just discussed which was clearly an action for damages for breach of contract.

In the last paragraph of the quotation appearing on page 58 of the brief, the court said that there could be no recovery for the reason that the extra work for which the plaintiff sought recovery did not arise under the contract but outside of it for the reason that the extra work was made necessary by the general contractor's failure to perform his duties under the subcontract.

United States v. Maryland Casualty Co., 54 Fed. Sup. 290 (D. Ct. La.), affirmed 147 Fed. 2d. 423 (C.C.A. 5). The plaintiff here sought damages for breach of contract and not the reasonable value of labor or materials furnished by him.

United States v. John A. Johnson & Sons, 65 Fed. Sup. 514 (D. Ct. Md.). Here also, the subcontractor sought to recover damages as such, resulting from the general contractor's breach of contract. The court relied upon the Friestedt case in stating that the subcontractor was not entitled to recover from the surety. It appears that the real basis for the court's decision, however, was the fact that the subcontractor was proceeding improperly in attempting to assert his rights by means of a counter-claim filed in a suit pending against the surety. In any event, in discussing the merits of the controversy, the court fell into the same error as the court in the Friestedt case by declaring that a subcontractor is not entitled to recover for anything except "labor and material actually called for by the contract between the

general contractor and the government, which is made a part of the contract between the general contractor and the subcontractor."

These four cases were cited by the Continental Casualty Company in support of its contention that Schaefer is not entitled to recover from it because the work done by him does not fall within the classification of "labor and material in the prosecution of the work provided for in said contract (the prime contract)," or if any of such work was within such classification there is no evidence segregating that portion from the remainder (Brief 48, 49).

Here also, it must be borne in mind that Macri Company were guilty of willful breaches of the subcontract. Stating this in another way, Macri Company voluntarily turned over part of their work to Schaefer who did what was required to be done to complete the project, under the conditions which existed. Everything done by him was "work provided for in said contract," when those words are given their natural, normal meanings. When his men fine graded an excavation, carried forms back to the yard for repairs, or did anything else which Macri Company imposed on them, they performed "work provided for in said contract" as surely as when they poured concrete. Everything done by him contributed to the completion of the project. He completed the job in the only way it could have been done. The mere fact that the cost of doing it as he did, was greater than his cost would have been normally does not mean

that the work was not of the kind "provided for in said contract."

If the courts deciding the Friestedt and Johnson cases believed that there can be no recovery from the surety, of the reasonable value of extra labor and materials actually furnished by a subcontractor under such circumstances as to permit a recovery against the general contractor, simply because they are supplied by him because of the general contractor's default, it is respectfully submitted that these courts were mistaken in their view of the law. The Supreme Court of the United States had previously held in the case of the *United States v. American Surety Co., supra,* 200 U. S. 197, 50 L. Ed. 437, 26 S. Ct. 168, that the statute is concerned with the protection of those who furnish labor and materials to the project, and not with "the particular contract or engagement under which the labor or materials were supplied." It is contended, therefore, that the mere fact that the subcontractor may have performed the obligations of another in furnishing labor and materials, does not mean that he can not recover the value of them from the surety.

This view finds added support in the cases already cited under this heading, and particularly in each of the following:

(1) *United States v. Mathew Cummings Co.,* 27 Fed. Sup. 405 (D. Ct. Mass.). Equipment furnished by one contractor was defective and it was necessary for the plaintiff, another subcontractor, to do extra work to put it in proper condition. The court held that the plaintiff

was entitled to recover for the work done in reconstructing such equipment.

(2) *United States v. Otis Williams & Co.,* 30 Fed. Sup. 590 (D. Ct. Ida.). The plaintiff, a subcontractor, performed certain work on a canal. When partly through the project, the government officers relocated it and the plaintiff's work became more difficult and extended over a greater period of time. The court held that the plaintiff was entitled to recover a sufficient sum to make him whole.

There is no reason whatever for adopting a forced and unreasonable construction of the Miller Act and this bond, in the face of the positive assertions of the Supreme Court that the statute and the bond must be liberally construed in determining who is protected thereby and for what items.

> *Standard Accident Ins. Co. v. United States,* 302 U. S. 442, 82 L. Ed. 350, 58 S. Ct. 314.
> *Brogan v. National Surety Co.,* 246 *U. S.* 257, 62 L. Ed. 703, 38 S. Ct. 250.

With respect to the fact that some of Schaefer's men were idle part of the time because of Macri Company's breaches of contract, it must be conceded that this idleness was a minor part of Macri Company's imposition on him. He could not discharge his men on each occasion they were required to wait. Consequently, he is entitled to recover the full amount of wages paid them on the principle of necessity heretofore discussed under this heading. Furthermore, the contention of the Continental Casualty Company that because there

was no evidence segregating the amount of wages paid for idle time, from the remainder, Schaefer is not entitled to recover anything, has been fully answered in the argument under heading V. It would seem to be in keeping with the Supreme Court's decisions, to declare that a paid surety, who has presumably made an investigation of his principal, assumes the risk of the principal's willful breaches of contract which render exact proof of the extent of recovery impossible, rather than the one who in the utmost good faith performs his obligations in reliance on the integrity of the principal and his surety.

Finally, it is contended by the Continental Casualty Company that Schaefer is not entitled to recover the item of profit. In the cases listed in support of that contention in its brief, page 68, only the first, second and fifth have anything whatever to do with that question.

United States v. Davidson, 71 Fed. Sup. 401 (D. Ct. Ida.). In entering judgment for the subcontractor, the court disallowed an item for profit, without any discussion of the question and without citing any authorities.

United States v. Great American Indemnity Co., 30 Fed. Sup. 613 (D. Ct. N. H.). Here also the trial court in entering judgment for the plaintiff, a subcontractor, declined to include an award for profit. The court discussed the question and cited three cases, two of which have no bearing on the question. The third is considered below.

Theobald-Jansen Electric Co. v. P. H. Meyer Co., 77

Fed. 2d. 27 (C.C.A. 10). Here the general contractor entered into an agreement with another company, the intervenor, by which the latter agreed to assume the obligations of the general contractor on a certain construction project, in return for half of the profit to be derived from it. The intervenor, after the work was completed, intervened in this action against the surety of the general contractor to recover the compensation which the latter had agreed to pay, namely, half of the profit to be derived from the project. The court denied a recovery, declaring that inasmuch as the general contractor could not sue his own surety, neither could the intervenor.

It is obvious that this decision is not an authority for the proposition that a subcontractor is not entitled to recover profit as an item making up the market value of his performance.

Respectfully submitted,

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